88-776

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARKANSAS STATE PROSECUTOR GENE RAFF, DEPUTY PROSECUTOR DAVID CAHOON, AND ARKANSAS LEE COUNTY CIRCUIT JUDGE HENRY WILKINSON, JR., IN THEIR OFFICIAL CAPACITIES ONLY, *Petitioners*

VS.

ROY C. LEWELLEN, JR., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A FEDERAL COURT MAY ENJOIN A PENDING STATE COURT CRIMINAL PROSECUTION BASED UPON THE "BAD FAITH" EXCEPTION TO THE *YOUNGER* ABSTENTION DOCTRINE WITHOUT CONSIDERING THE STRENGTH OF THE STATE'S EVIDENCE OR THE SERIOUSNESS OF THE CHARGES.

II.

WHETHER THE EIGHTH CIRCUIT ERRED IN HOLDING THE DISTRICT COURT'S FINDINGS SUFFICIENT TO ENJOIN A PENDING STATE FELONY PROSECUTION.

PARTIES BELOW

Petitioners Prosecutor Gene Raff, Deputy Prosecutor David Cahoon, Arkansas Lee County Circuit Judge Henry Wilkinson, Jr., in their individual and official capacities; Lafayette Patterson; Jeanne Kennedy; Arkansas State Trooper Doug Williams; Lee County, Arkansas; Arkansas Lee County Sheriff Robert May, Jr.; Robert Banks; Margie Banks; Reverend Almore Banks; and Respondent Roy C. Lewellen, Jr.

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This Court should grant certiorari and reverse the Eighth Circuit Court of Appeals because its interpretation of the "bad faith" exception to the *Younger* abstention doctrine conflicts with every other Circuit Court decision to address the same issue as well as the decisions of the United States Supreme Court. Furthermore the issue to be addressed is of great constitutional magnitude and extreme public importance.

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ARKANSAS STATE PROSECUTOR GENE RAFF,
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CAPACITIES ONLY — *Petitioners*

VS.

ROY C. LEWELLEN, JR. — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Prosecutor Gene Raff, Deputy Prosecutor David Cahoon, and Arkansas State Circuit Judge Henry Wilkinson, Jr., petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

On December 8, 1986, the U.S. District Court for Eastern District of Arkansas, George Howard, Jr., 649 F. Supp. 1229, (Appendix pp. A 39-A 51) enjoined Respondent Lewellen's state criminal prosecution. On appeal, a panel of the Eighth Circuit Court of Appeals affirmed *Lewellen v. Raff,* 843 F.2d 1103 (8th Cir. 1988) (Appendix pp. A 1-A 38). The Eighth Circuit Court of Appeals denied the Petition for Rehearing on July 14, 1988, *Lewellen v. Raff,* 851 F.2d 1108 (8th Cir. 1988) (Appendix p. A 63) On September 28, 1988, Petition for Rehearing was denied as well as Petition for rehearing rehearing en banc. (Appendix p. A 64) These orders are reprinted in the Appendix to this Petition.

JURISDICTION

On April 4, 1988, the Court of Appeals for the Eighth Circuit confirmed the District Court's preliminary injunction granted December 8, 1986. The Court of Appeals denied a petition for rehearing on July 14, 1988, and on September 28, 1988, it denied a petition for rehearing and for rehearing en banc. On October 12, 1988, Justice Blackmun granted an extension of time until November 11, 1988, for petitioners to file petition for a writ of certiorari. This Court has discretionary jurisdiction to review this case under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

On September 3, 1985, the rape trial against Rev. Almore Banks commenced with jury selection. Banks, a black man, represented by respondent, Roy C. Lewellen, a black attorney, was charged with raping the eleven year old daughter of Mrs. Lafayette Patterson, a black woman. Respondent Lewellen has admitted that two days following commencement of the Banks trial, he attempted to negotiate a **secret** agreement between the Banks family and Mrs. Patterson whereby Mrs. Patterson would be paid $500 in exchange for her promise to "drop the charges." (T. 557, 558, 559, 563, 843 F.2d 1107 n.4, 1108). Mrs. Patterson had previously been identified as a state's witness against Banks. When Mrs. Patterson later announced it was not up to her to "drop the charges," Lewellen told her:

> See, it's up to you in the sense that if you and your child don't come up here, then they're going to drop it. They can't make you come to no courtroom and testify to nothing. I don't give a shit if they subpoena you. You don't have to—you can go up there and say, "I ain't got nothing to say." You understand? Huh?

843 F.2d at 1108. Unbeknownst to Lewellen, the conversations were recorded by State Trooper Doug Williams.

On September 27, 1985, the petitioning prosecutors, having received the state police investigative report, including the tapes and Mrs. Patterson's statement, charged Lewellen and Rev. Banks with witness bribery and conspiracy to commit witness bribery. On that date Municipal Judge Dan Felton, III, not a party to this case, reviewed the information and found probable cause existed to support these felony charges. Most of the facts leading up to the prosecutors' decision to initiate Lewellen's prosecution are set out in the Eighth Circuit Court of Appeals' April 4, 1988, order, *Lewellen v. Raff*, 843 F.2d at 1105-08, (Appendix pp. A 1-A 38). The Arkansas witness bribery statute, to which Lewellen makes no constitutional challenge, is reproduced at 843 F.2d 1107 n.5 (Appendix p. A 12).

On April 28, 1986, on the eve of Lewellen's state criminal trial, Lewellen brought suit in Federal Court against these state government officials pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 claiming they had conspired to prosecute him due to his race and in retaliation of his exercise of federally protected constitutional rights. Jurisdiction in the Federal District Court was invoked pursuant to 28 U.S.C. § 1343.

Following extensive discovery, on November 14, 1986, the district court temporarily restrained Lewellen's state criminal trial. On November 24, 1986, the district court began conducting a lengthy hearing on Lewellen's

motion for a preliminary injunction, as well as on the defendant's numerous motions for summary judgment. On December 8, 1986, after hearing six and one-half days of testimony and other evidence over a 12-day period the district court entered a preliminary injunction to the state criminal prosecution. *Lewellen v. Raff*, 649 F. Supp. 1229 (E.D. Ark. 1986). The trial court found that the prosecution was initiated in retaliation for Lewellen's vigorous defense of his client, Rev. Banks. *Lewellen v. Raff*, 649 F. Supp. 1229, 1232 (E.D. Ark. 1986); *Lewellen v. Raff*, 843 F. 2d 1103, 1110 (8th Cir. 1988); (Appendix at pp. A 1-A 38). The District Court never mentioned Lewellen's admitted incriminating statements which, along with the testimony of Mrs. Patterson, served as the basis for the charges against him. On appeal the Eighth Circuit affirmed the preliminary injunction, holding:

> we find that the district court's finding of a retaliatory prosecution is not clearly erroneous, we therefore need not and do not address the issue of whether the prosecutors entertained a reasonable expectation of obtaining a conviction of Lewellen.

843 F. 2d at 1112. Later, in denying the petition for rehearing on July 14, 1988, the Eighth Circuit again held the strength of the evidence against Lewellen was irrelevant, stating:

> to obtain a preliminary injunction in this

> context the plaintiff need **only** show the prosecution was motivated **in part** by a purpose to retaliate against constitutionally protected conduct.

851 F.2d at 1110 (emphasis added), (Appendix, p. A 60).

ARGUMENT

WHETHER A FEDERAL COURT MAY ENJOIN A PENDING STATE CRIMINAL PROSECUTION BASED UPON THE "BAD FAITH" EXCEPTION TO THE *YOUNGER* ABSTENTION DOCTRINE WITHOUT CONSIDERING THE STRENGTH OF THE STATE'S EVIDENCE OR THE SERIOUSNESS OF THE CHARGES.

The pivotal issue in this case turns on the nature and quantum of proof necessary to enable a federal court to override *Younger* and enjoin an ongoing state felony prosecution. Under the newly crafted Eighth Circuit rule, a state criminal defendant may circumvent *Younger* by merely establishing that his prosecution was motivated "in part" by an allegedly improper retaliatory purpose. 851 F. 2d at 1110. That is all that the Eighth Circuit requires. Contrary to the positions taken by other circuits, the Eighth Circuit does not require proof that the alleged improper purpose was a "substantial" factor, much less a "major motivating factor." *Cf. Smith v. Hightower*, 693 F. 2d at 367 (retaliation must be a "major motivating factor" and play "a prominent role in the decision to prosecute"). Nor does the strength of the State's case against the criminal defendant have any role in the Eighth Circuit's analysis. Instead, under the new Eighth Circuit test, a state prosecution motivated "in part" by an improper purpose may be enjoined *pendente*

lite no matter whether the evidence of the criminal defendant's guilt is overwhelming. Because the Eighth Circuit's test so drastically strays from the principles announced in *Younger*, review should be granted by this Court.

THE EIGHTH CIRCUIT'S LEGAL STANDARD FAILS TO INCLUDE CONSIDERATION OF THE STRENGTH OF THE STATE'S EVIDENCE OR SERIOUSNESS OF THE CHARGES.

By authorizing the entry of a federal preliminary injunction to a pending state court criminal prosecution without determining whether there is a reasonable expectation of obtaining a valid conviction or considering the strength of the state's evidence, the Eighth Circuit's recent decisions conflict with decisions of the United States Supreme Court and all other circuits that have addressed the issue. *Younger v. Harris*, 401 U.S. 37, 48 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cameron v. Johnson*, 390 U.S. 611, 621 (1968); *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Ledesma v. Perez*, 401 U.S. 82, 85 (1971); *Allee v. Medrano*, 416 U.S. 802, 819, (1974); *Munson v. Janklow*, 563 F.2d 933, 935 (8th Cir. 1977; *Central Avenue News, Inc. v. City of Minot*, 651 F.2d 565, 570 (8th Cir. 1981); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1022 n.14 (3d Cir. 1981); *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975); *Fitzgerald v. Peek*, 636 F.2d

943, 945 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981); *Smith v. Hightower*, 693 F.2d 359, 370 (5th Cir. 1982); *Wilson v. Thompson*, 593 F.2d 1375, 1387 n.22 (5th Cir. 1979); *Honey v. Goodman*, 432 F.2d 333, 344 (6th Cir. 1970); *Boyle v. Landry*, 422 F.2d 631, 633 (7th Cir. 1970).

In essence, the Eighth Circuit has ignored the prosecutor's contentions that Lewellen's incriminating tape-recorded statements and the testimony of his primary accuser, Mrs. Lafayetta Patterson, provide a reasonable basis for the prosecutors to expect that Lewellen could be convicted. Indeed, the Eighth Circuit's new standard renders such proof wholly irrelevant for purposes of determining whether a preliminary injunction should issue.

The Eighth Circuit attempts to legitimize its refusal to address the State's more than ample evidence against Lewellen by creating a tenuous and unprecedented standard of proof to enjoin preliminarily, as opposed to permanently, a pending state prosecution. The holding constitutes a radical departure from the precedents above.

Petitioners submit that the Eighth Circuit erred in failing to employ *Younger* abstention as a threshold jurisdictional issue to be addressed in addition to employment of the general preliminary injunction standard. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Oddly enough, in

its first opinion, *see* 843 F.2d at 112 n.10, the Eighth Circuit invoked Judge Sarokin's decision in *Wichert v. Walter*, 606 F. Supp. 1516 (D.N.J. 1985) to sustain the injunction issued below. Yet Judge Sarokin held *Younger*'s jurisdictional hurdle applicable, even at the preliminary injunction stage, stating at 606 F. Supp. 1519:

> Where the preliminary relief requested is an injunction against state disciplinary proceedings, the litigant must also demonstrate [in addition to the general preliminary injunction standard] that the threatened harm to him is egregious enough to surmount the jurisdictional hurdle of *Younger v. Harris* (citations omitted) and its progeny.

Judge Sarokin further noted that *Younger*'s jurisdictional hurdle includes a showing the prosecutions were "not made with any expectation of securing valid convictions." *Id.* at 1520 (quoting *Younger v. Harris*, 401 U.S. 37, 48 (1971) (quoting *Dombrowski*, 380 U.S. 479, 482 (1965)).

The Eighth Circuit's distinction between a preliminary and a permanent injunction, never recognized by this Court, allows the "bad faith" exception to the *Younger* doctrine to swallow the rule. This Court has repeatedly and consistently imposed a heavy burden upon a federal court plaintiff seeking to interfere with pending state court proceedings without

regard as to whether it be by preliminary or permanent injunction. *Dombrowski*, 380 U.S. 479 (1965); *Cameron*, 390 U.S. 611; *Younger*, 401 U.S. 37, 48 (1971); *Kugler*, 421 U.S. 117, 126 n.6 (1975). The practical effect of a *Younger* "bad faith" preliminary injunction is the same as that of a permanent injunction—to forever bar the state criminal prosecution.

Other decisions do not recognize the Eighth Circuit's distinction. *See Boyle v. Landry*, 422 F.2d 631 (7th Cir. 1970) (applying same standards without regard to whether by preliminary or permanent injunction); *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1970) (injunction relief available only where the state instituted proceedings in bad faith with no real hope of ultimate success). *See also Central Avenue News, Inc. v. City of Minot*, 651 F.2d 565, 570 (8th Cir. 1981) (federal interference with pending state criminal proceedings justified only where shown the lack of a reasonable expectation that valid convictions will result); *Munson v. Janklow*, 563 F.2d 933 (8th Cir. 1977) (dismissal of injunction relief claim upheld where plaintiff failed to allege prosecution brought without a reasonable expectation of obtaining a valid conviction).

IMPORTANCE

The Eighth Circuit's standard ignores the deeply entrenched constitutional principles of comity and Federalism. Should the Eighth Circuit's standard be

allowed to stand, virtually no state prosecution will be free from the threat of federal court interference. The present case, where the federal court has already enjoined Lewellen's prosecution for almost two years, classically underscores why *Younger*'s "bad faith" exception should be parsimoniously applied even at the preliminary injunction stage. Moreover, where, as here, the preliminary injunction hearing involved six and one-half days of testimony following more than six months of extensive discovery, the Federal Court must not hold plaintiff to such lenient standard of proof to demonstrate the impermissible motivation behind the prosecution while simultaneously ignoring the most salient and relevant evidence in the record, the state's evidence supporting the decision to prosecute.

By lowering the quantum of proof necessary to establish "bad faith" and simultaneously disregarding the state's proof against the accused, the Eighth Circuit test ignores the severe impact that even a preliminary injunction can have on a state criminal prosecution. After years of delay, witnesses' memories fade, evidence grows stale, complaining parties' fervor subsides, and witnesses may move away, die, or otherwise become unavailable. Political pressure placed upon a state prosecutor as a result of a federal court preliminarily enjoining him from prosecuting due to his alleged "bad faith" virtually assures that the prosecution will be permanently abandoned. Even if the district court ultimately denied a permanent injunction in the case at

bar, the state's ability to prosecute Lewellen has already been crippled.

The rule fashioned by the Eighth Circuit carries other equally unpalatable consequences. For example, under the guise of carrying out discovery in the federal proceeding, Lewellen, over petitioners' objections, has been afforded the opportunity to rigorously interrogate the state's witnesses against him, which would otherwise be prohibited under Rule 17 of Arkansas Rules of Criminal Procedure. Lewellen's primary accuser, Lafayetta Patterson, and the investigating officers have been subjected to hours of examination in depositions and in federal court. Few complaining witnesses in state criminal prosecutions could have withstood the intense pressure placed upon Mrs. Patterson, after being sued in this case for damages, particularly after the federal court has refused to abstain from exercising jurisdiction. In short, the ill effects of an injunction that *Younger* foresaw have already been visited upon the State even though the injunction entered was technically *pendente lite*.

Should the preliminary injunction not be reversed, Lewellen will be afforded still another hearing for a permanent injunction where he may further interrogate the state's witnesses against him. Even if a permanent injunction is ultimately denied and the prosecution found to have been brought in good faith, the state will have to await, in essence, a third trial before having the opportunity to present in state court the strong evidence

of Lewellen's criminal violation.

Twenty years ago, this Court observed, "the issue of guilt or innocence is for the state court at the criminal trial; the State [is] not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions." Cameron, 390 U.S. at 621, 88 S.Ct. at 1341. Notwithstanding this admonition, the Eighth Circuit has virtually decided Lewellen's innocence even though there was no finding his prosecution was brought with "no expectation of conviction[s] but **only** to discourage the exercise of protected rights." *Cameron*, 390 U.S. at 621 (emphasis added); *Boyle*, 422 F.2d 631, 633 (7th Cir. 1970).

THE FIFTH CIRCUIT TEST IS ERRONEOUSLY APPLIED

Relying on a trilogy of Fifth Circuit cases, *Wilson v. Thompson*, 593 F.2d 375 (5th Cir. 1979); *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981); *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982), the Eighth Circuit's second Order held:

> [T]o obtain a preliminary injunction in this context the plaintiff need **only** show that the prosecution was motivated 'in part' by a purpose to retaliate against constitutionally protected conduct.

851 F.2 at 1110 (emphasis added). The dangerous aspect of this rule is that every criminal defendant who has any ties to local politics or who is otherwise outspoken on political issues can derail his state prosecution by claiming that a witness, investigator, prosecutor, or judge is aligned with a political opponent.

Thus, despite its reference to the Fifth Circuit decisions, the Eighth Circuit has created a truncated version of the Fifth Circuit test that omits reference to critical components employed in the very cases upon which the Eighth Circuit relies. Contrary to the Eighth Circuit's interpretation, the Fifth Circuit's approach requires consideration of evidence of a criminal violation in granting a preliminary injunction, *Hightower*, 693 F.2d at 370 n.27. Moreover, the Fifth Circuit recognized in *Hightower* that a plaintiff must show more than that his prosecution was motivated **in part** by retaliation. Instead, he must prove that retaliation is a **major** motivating factor:

> We conclude the *Wilson* court did not mean that any showing of retaliation was sufficient evidence to meet the plaintiff's burden, because this would conflict with the holding of *Younger* that injunctions of state court proceedings are to be granted only in narrow circumstances. In stating that the plaintiff must prove retaliation exists before a preliminary injunction will be granted, the *Wilson* court contemplated that the

> plaintiff must prove retaliation was a **major** motivating factor and played a **prominent** role in the decision to prosecute.

693 F.2d at 367 (emphasis added). The second Eighth Circuit opinion reasons that, at the preliminary injunction stage, only the first two prongs of the three-part Fifth Circuit test are applicable. However, *Hightower* makes clear that the "strength of the evidence and the seriousness of the charges" may even prevent plaintiff from carrying his heavy burden on the second (retaliation) prong. *Id.* at 370 n.27.

Contrary to the suggestion in the second Eighth Circuit opinion, 851 F.2d at 1109 (Appendix A 61) the state does not contend that *Fitzgerald* has been overruled by *Hightower.* Rather, *Fitzgerald, Wilson* and *Hightower* all require the federal court to consider the strength of the evidence and seriousness of the charges to determine whether plaintiff has carried his heavy burden on the retaliation prong (second prong) as well as the third prong:

> Strong evidence of criminal activity weakens the finding of retaliation and may prevent the plaintiff from carrying his heavy burden on the retaliation prong. If the plaintiff establishes his case for retaliation, the strength and the seriousness of the charges remains relevant in determining if the prosecution would have been

brought anyway under the third prong of *Wilson.*

Hightower, 693 F.2d at 370 n.27.

According to the Eighth Circuit, *Fitzgerald*'s conclusion that a showing of bad faith "will justify an injunction regardless of whether a valid conviction **conceivably** could be obtained," 636 F.2d at 945 (emphasis added), means that a criminal defendant may circumvent *Younger* without proving that there is reasonable expectation of his conviction. However, the language in *Fitzgerald* is not inconsistent with requiring plaintiff to show there is no reasonable expectation of conviction. Requiring a showing a conviction is **inconceivable** is a much more onerous burden than merely requiring a showing it cannot be reasonably expected. Contrary to the Eighth Circuit's holding, the state has a legitimate interest in pursuing a criminal prosecution like Lewellen's, brought with full probable cause, regardless of whether it is proven to be motivated "in part" by some impermissible purpose.

LEWELLEN HAS AN ADEQUATE REMEDY IN STATE COURT

The Eighth Circuit has not required Lewellen to carry his heavy burden of showing Arkansas law fails to provide an adequate legal remedy of which he may avail himself. *See Ohio Civil Rights Commission v. Dayton Christian Schools,* 477 U.S. 619, 106 S.Ct. 2718, 2723-24

(1986); *University Club v. City of New York*, 842 F.2d 37, 40-42 (2d Cir. 1988); *Bonner v. City of St. Louis, Mo.*, 526 F.2d 1331, 1335 (8th Cir. 1975). A federal court cannot indulge in the assumption that the state trial and appellate courts are incapable of fairly adjudicating plaintiff's claim that the state court systematically conspires to harass, intimidate, coerce, discriminate, and deny equal protection to black citizens. *Id.* at 1337. In *Bonner*, the Eighth Circuit held such allegation, analogous to those made by Lewellen, insufficient to state a claim with the narrow exception to *Younger*.

The **only** claim the Eighth Circuit has questioned whether Lewellen can adequately raise in state court in defense of the witness bribery charge is his First Amendment claim regarding the scheduling of his criminal trial. 843 F.2d at 1112 n.9. However, this finding is irrelevant to the issue of whether to enjoin his prosecution since: (1) Lewellen's claim here is not based on why his prosecution was **brought**, but rather, why his trial was **scheduled** when it was; and (2) the fact that Lewellen was scheduled to be tried **after** his election goes against a finding it was calculated to impede his First Amendment rights.

THE EIGHTH CIRCUIT ERRED IN HOLDING THE DISTRICT COURT'S FINDING OF A RETALIATORY OR "BAD FAITH" PROSECUTION NOT CLEARLY ERRONEOUS.

Even applying the less stringent Fifth Circuit standard, the findings of the District Court cannot support the entry of a preliminary injunction. In both opinions, the Eighth Circuit has refrained from addressing the strength of the evidence or the seriousness of the charges against Lewellen.

The first Eighth Circuit opinion described the District Court's opinion as "somewhat cryptic as to the precise basis for the District Court's findings [that prosecution brought in bad faith for the purpose of retaliation]". 843 F.2d at 1110 (Appendix A 19). There the Eighth Circuit went on to state: "Moreover it is of no significance that the district court's findings concerning the impermissible purposes behind the prosecution are irrelevant to the issue of whether the prosecutors had a reasonable expectation of obtaining a conviction." 843 F.2d at 1112 (Appendix A 25). In contrast, the Eighth Circuit's second opinion, 851 F.2d at 1110, states the district court "fully satisfied" *Hightower*'s requirement that " 'the strength of the evidence and the seriousness of the charges should be considered in determining if retaliation or bad faith exists,' 693 F.2d at 369." The two findings are irreconcilable.

The second Eighth Circuit opinion, after holding it need not consider the state's evidence, inconsistently stated the district court "reviewed the evidence of Lewellen's allegedly criminal activities at length" in concluding there is no expectation of conviction, 851 F.2d at 1110. However, the district court failed to even mention Lewellen's admitted and incriminating statements (*see* 843 F.2d 1107 n.4, 1108) or Arkansas' bribery statute (843 F.2d at 1107 n.5), which serve as the principal bases for his being charged. In this regard, the district court found a substantial likelihood that Lewellen will establish there is no reasonable expectation of his conviction **solely** based (1) on the poor quality and alleged gaps in certain tape-recorded statements and (2) on its finding that Lewellen would likely demonstrate that lawyers commonly act as intermediaries to have criminal charges dropped. 649 F. Supp. at 1233. The district court's findings here are clearly erroneous and fail to satisfy the district court's responsibility to scrupulously consider the strength of the evidence and the seriousness of the charges against Lewellen.

First, the district court, to support its conclusion, apparently reasoned that the alleged gaps in Tapes E-2 and E-4 would render them inadmissible in state court by finding their "prejudicial effects . . . outweigh any probative value." *Id.* at 1233. As an initial matter, it is within the exclusive authority of the state trial court, not the federal court, to determine the admissibility of

evidence in Lewellen's criminal trial. *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971). Thus, the federal district court improperly reached issues that will determine the outcome of pending state criminal proceedings. *Id.*; *Feaster v. Miksch*, 846 F.2d 21, 24 (6th Cir. 1988). *See also Deakins v. Monaghan*, 108 S.Ct. 523, 533 (1988) (White, J. concurring) (*Younger* and *Samuels* counsel against federal court's disposition of Fourth, Fifth and Sixth Amendment issues due to potential *res judicata* effect on state criminal proceeding.) More importantly, however, Lewellen **admitted** in federal court that he made all the incriminating statements upon Tapes E-2 and E-4 and in fact stipulated that these tapes and the transcript prepared from them are the best evidence of what occurred during these conversations (T. 565).

Second, the district court's finding that Lewellen could likely demonstrate that lawyers commonly serve as "intermediaries" to have charges dropped is also irrelevant and clearly erroneous. Lewellen admitted he negotiated a secret agreement whereby Mrs. Patterson would be paid $500.00 in exchange for her agreement to "drop the charges." (T. 557, 558, 559, 563; see also Tape E-2 at 843 F.2d 1107 f.4, and Tape E-4, at 843 F.2d 1108). Lewellen has further admitted that prior to these conversations he was aware that the prosecutors had listed Mrs. Patterson and her daughter as witnesses for the State. (T. 599, 600). The glaring distinction between Lewellen's admitted conduct and that of an attorney serving as an intermediary to have the charges dropped

is underscored by his adamant directive to the Banks family and Ms. Patterson to keep the agreement secret, especially from the prosecutors and the court:

> What we talk about here will never go any further. That is a solemn word on everybody's part, okay?

843 F.2d at 1107, n.4.

If Lewellen was acting as an intermediary, it was clearly not in cooperation with the prosecutor or the court to have the charges dropped, but rather to have Mrs. Patterson bribed. The next day Lewellen made crystal clear that he was attempting to induce Mrs. Patterson to refuse to testify, stating to her:

> See, it's up to you in the sense that if you and your child don't come up here, then they're going to drop it. They can't make you come to no courtroom and testify to nothing. I don't give a shit if they subpoena you. You don't have to—you can go up there and say, "I ain't got nothing to say." You understand? Huh?

843 F.2d at 1108.

THE DISTRICT COURT'S FINDINGS WERE CLEARLY ERRONEOUS

The trial court's finding that Lewellen sufficiently proved his prosecution was retaliatory is clearly

erroneous. Lewellen's three convoluted theories are supported by nothing more than tenuous chain of inferences as follows:

A. **Evidence The Prosecution Motivated By Lewellen's Race**

The sole evidence relied upon by the Eighth Circuit and the District Court to support this allegation is the testimony of Neal, a black attorney who initiated the investigation leading to the charges against Lewellen. Neal, who had never tried a case against either Raff or Cahoon before a jury, merely testified in his opinion black attorneys were subjected to disparate treatment by Raff and Cahoon. There is simply no evidence linking the motivation behind Lewellen's prosecution to his race. Moreover, the district court made no such finding.

B. **Evidence Lewellen's Prosecution Motivated By His Vigorous Defense of Banks**

Where, as here, the prosecutors were presented with more than ample evidence that Lewellen's vigorous defense of Banks included his bribing of the state's key witness, they were duty bound to pursue Lewellen's prosecution.

The sole evidence to support Lewellen's theory here is the disputed testimony of Lewellen and Blount regarding their conversations with Sheriff May, who had

no part in the decision to prosecute. They testified May suggested Lewellen should apologize for his unprofessional conduct in the September 9, 1985, "special proceeding" (T. 278-283, see also 1071). It is undisputed both Blount and Lewellen considered May a friend and confidant and sought his advice. At most, their testimony merely establishes that May advised Lewellen to apologize and "insinuated" that to do so might help persuade the prosecutors not to prosecute (T. 277). Most importantly these conversations occurred after all of Lewellen's incriminating statements had been made.

C. Evidence Lewellen's Prosecution Motivated By His Political Campaign

There is no evidence that the prosecutors or the circuit judge even knew of Lewellen's plans for political office at the time the charges were brought, or for that matter if they even cared. To the contrary, Lewellen was charged in September of 1985, a time when Lewellen was not even a candidate. (T. 482). Furthermore there is no evidence that Lewellen's political opponent was supported by any defendant in this case. (T. 1061).

The Eighth Circuit's reliance on the resetting of Lewellen's trial to November 17, 1986, as evidence that his prosecution in 1985 was politically motivated is misplaced. Lewellen had previously secured numerous continuances of trial dates scheduled **before** the election.

The November, 1986, date was **after** the election. Moreover, Lewellen's trial date was reset over a year after he was charged with full probable cause and over six months after he sought federal court injunctive relief. Thus, its relevance to whether the charges were **brought** in bad faith is highly tenuous.

Lewellen's purported proof of a retaliatory prosecution "is nothing more than a tenuous chain of inferences unsupported by evidence or reason." *Smith*, 693 F.2d at 373. Furthermore, neither the district court nor either panel opinion mentions or addresses the seriousness of the bribery charge, a class C felony punishable by 3 to 10 years imprisonment, as the second prong in *Hightower* requires. 693 F.2d 370 n.27. In this regard the official commentary to Arkansas's Witness Bribery Statute, Ark. Code Ann. §5-53-108 (1987), removes any doubt about the seriousness of the acts attributed to Lewellen:

> To the extent the section reaches a mere offer, it establishes an inchoate offense. This reflects the commission's view that the conduct described is so deleterious to the administration of justice that attempts are justifiably graded with the same severity as the consummated offense.

CONCLUSION

This case classically exemplifies why the constitutional principles of comity and federalism are so important in the *Younger* abstention context even at preliminary injunction stage. Lewellen has attempted to manipulate the state criminal justice system by allegedly bribing the state's key witness in his client's rape trial. Lewellen has successfully manipulated the federal judicial system to unreasonably delay and possibly bar his state criminal prosecution. Lewellen's admitted statements to Mrs. Patterson, never mentioned by the district court, are more than ample to support his conviction for bribery. The strong evidence of Lewellen's criminal violation supports the inference that in bringing the charges, the prosecutors were motivated by nothing more than fulfilling their sworn duty. *Hightower*, 693 F.2d at 371. By contrast, the evidence Lewellen presented to support his allegation that his prosecution was retaliatory "is nothing more than a tenuous chain of inferences unsupported by the evidence or reason." *Id.* at 373.

The state criminal justice system will be severely handicapped if, as here, federal trial courts allow criminal defendants to thwart their state court prosecution based upon such a scant showing the prosecution is motivated "in part" by some impermissible purpose while ignoring the most relevant

evidence, the state's evidence of a criminal violation. The federal court must scrupulously review the strength of the state's evidence and the seriousness of the charges in granting a preliminary injunction to a pending state criminal prosecution. *Id.* at 370 n.27. Since the Eighth Circuit stands alone in refusing to impose this requirement, certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1069

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and in his official capacity as Prosecuting Attorney for the First Judicial District of Arkansas; David Cahoon, individually and in his official capacity as Deputy Prosecuting Attorney for Lee County, Arkansas; Henry Wilkinson, individually and in his official capacity as Circuit Court Judge for the First Judicial District of Arkansas,
Appellants.

Lafayette Patterson; Jeanne Kennedy; Doug Williams; Lee County, Arkansas; Robert May, Jr., individually and in his official capacity as Sheriff of Lee County.

Lafayette Patterson

v.

Robert Banks; Margie Banks; Reverend Almore Banks.

No. 87-1100

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and in his official capacity as Prosecuting Attorney for the First Judicial District of Arkansas; David Cahoon, individually and in his official capacity as Deputy Prosecuting Attorney for Lee County, Arkansas;

Lafayette Patterson; Jeanne Kennedy;

Doug Williams,

Appellant.

Lee County, Arkansas; Robert May, Jr., individually and in his official capacity as Sheriff of Lee County; Henry Wilkinson, individually and in his official capacity as Circuit Court Judge for the First Judicial District of Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks; Reverend Almore Banks.

No. 87-1101

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and
in his official capacity as
Prosecuting Attorney for the
Eastern Judicial District of
Arkansas; David Cahoon,
individually and in his
official capacity as Deputy
Prosecuting Attorney for
Lee County, Arkansas;
Lafayette Patterson; Jeanne
Kennedy; Doug Williams;
Lee County, Arkansas;

Robert May, Jr., individually
and in his official capacity
as Sheriff of Lee County,

Appellant.

Henry Wilkinson, individually
and in his official capacity
as Circuit Judge for the
First Judicial District of
Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

No. 87-1103

Roy C. Lewellen, Jr.,

Appellant,

v.

Gene Raff, individually and
in his official capacity as
Prosecuting Attorney for the
First Judicial District of
Arkansas; David Cahoon,
individually and in his
capacity as Deputy
Prosecuting Attorney for
Lee County, Arkansas,

Appellees.

Lafayette Patterson; Jeanne
Kennedy; Doug Williams; Lee
County, Arkansas; Robert
May, Jr., individually and
in his official capacity as
Sheriff of Lee County;
Henry Wilkinson, individually

and in his official capacity
as Circuit Court Judge for the
First Judicial District of
Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

Appeals from the United States District Court
For the Eastern District of Arkansas.

Submitted: October 14, 1987
Filed: April 4, 1988

Before LAY, Chief Judge, ARNOLD and BOWMAN, Circuit Judges.

LAY, Chief Judge.

At issue is the serious question whether the federal district court[1] erred in not exercising *Younger*[2] abstention by enjoining a criminal prosecution brought by the State

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[1] The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

[2] Younger v. Harris, 401 U.S. 37 (1971).

of Arkansas against a black attorney in Lee County, Arkansas. We affirm the grant of the temporary injunction. We reverse in part the district court's rulings on the section 1983 damages claims.

I. Background

On June 7, 1984, Reverend Almore Banks, a black minister, was charged with rape in the Circuit Court of Lee County, Arkansas. The alleged victim was Latonia Wilbun, the eleven-year-old daughter of Mrs. Lafayetta Patterson.[3] Mrs. Patterson's husband, Joe Lewis Patterson, is the brother of Rev. Banks's wife, Margie Banks. The Pattersons are also black.

Rev. Banks engaged Roy Lewellen, a black attorney, to represent him. Mrs. Patterson employed Olly Neal, also a black attorney, to represent her interest and the interest of her daughter in the criminal prosecution. Lee County Prosecutor Gene Raff and Deputy Prosecutor David Cahoon, both white, represented the state in the proceeding.

Jury selection in Banks's trial began Tuesday, September 3, 1985, with Judge Harvey Yates presiding. On Thursday, September 5, Neal contacted Deputy Prosecutor Cahoon to inform him that Mrs. Patterson was being pressured to "drop the charges" against Banks. Mrs. Patterson claimed that the pressure was coming

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[3] Mrs. Patterson is referred to both as Lafayette and Lafayetta in the record and in the parties' submissions.

rom her husband, from Rev. and Margie Banks, and from Rev. Banks's brother, Robert.

Mrs. Patterson and others testified about the events that took place that Wednesday that prompted Neal to contact the prosecutor. Robert Banks came to the Patterson house on Wednesday morning and discussed the pending charges against Rev. Banks with the Pattersons. The three of them reached an apparent agreement that if Mrs. Patterson would drop the charges, Rev. Banks would leave town. Mrs. Patterson, however, claims that she did not then or ever actually intend to drop the charges.

Mr. and Mrs. Patterson and Robert Banks then proceeded to Neal's office, apparently to have him prepare a paper documenting their agreement. Margie Banks somehow was informed of or arranged the meeting at Neal's office. She called Lewellen and informed him that he too should go to Neal's office, because Mrs. Patterson was going to drop the charges against Lewellen's client.

When they arrived at Neal's office, Mrs. Patterson met privately with Neal. She told him that she in fact had no intention of dropping the charges. Neal relayed this information to those assembled in his office. Mr. Patterson became angry, feeling that his wife had been steadily lying to him about dropping the charges. Lewellen left Neal's office immediately, saying only,

according to Mrs. Patterson, that he thought the family was going to solve it.

Later that day, after returning home, Mr. Patterson phoned Margie Banks and told her that Mrs. Patterson was indeed going to drop the charges. Mrs. Patterson claims she led her husband to believe this because she was afraid of him and wanted everyone to leave her alone. After a series of phone calls, it was arranged that Lewellen would bring Rev. and Margie Banks to the Patterson home. Robert Banks was also present at this meeting. Lewellen did not stay at the meeting.

The parties again reached an apparent agreement that Mrs. Patterson would drop the charges, Rev. Banks would leave town, and Mrs. Patterson would be reimbursed by the Bankses for $500 attorney's fee she had incurred by retaining Neal to represent her interests. Lewellen later returned to pick up his client. He did not wish to hear what happened at the meeting, stating something to the effect of, "look here, if you all are going to settle this, settle it with your family. I don't want to have anything to do with it. I don't want to know what's going on."

These were the events that, when relayed to Neal, prompted him to call Deputy Prosecutor Cahoon. Cahoon then told Prosecutor Raff and Lee County Sheriff Robert May that he had received information suggesting that bribes were being offered to Mrs.

Patterson by Rev. Banks to induce her to drop the charges. At the direction of the prosecutors, May requested investigatory assistance from the Arkansas state police. May informed the state police that electronic surveillance equipment might be needed to conduct the investigation.

Later that day, Sgt. Douglas Williams of the state police arrived in town to begin assisting in the investigation, bringing with him his electronic surveillance equipment. Williams, May, and Cahoon met with Mrs. Patterson and Neal at the Marianna jail to discuss Mrs. Patterson's complaint. Jeanne Kennedy, a victim's advocate and child abuse and rape counselor, was also present. Mrs. Patterson was equipped with a hidden body microphone and directed to engage in conversation with Mr. Patterson and others to corroborate her allegations. Although Rev. Banks was an investigatory target at this point, Lewellen was not.

Mrs. Patterson left the jail, found her husband at the local ball field, and told him that she would agree to drop the charges if Rev. Banks left town and the parties adhered to their agreement of the day before. She also told him that she wanted a lawyer to draft a document setting forth Rev. Banks's agreement to leave town. Mrs. Patterson then made a series of phone calls. The Pattersons' part of these conversations was recorded by Sgt. Williams, who operated a receiving and recording device in a car parked near the Patterson home. The

tape, referred to as "E-1," contains at least two and allegedly more gaps in transmission.

That night the Pattersons and the three Bankses met with Lewellen at Lewellen's office. Mrs. Patterson was still equipped with a body microphone, and the conversation was recorded.[4] Later that night, the tape

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[4] The relevant portion of that tape, identified as "E-2," contains the following conversation:

> BL [Lewellen]: * * * Reverend, it is the understanding that you and your wife are going to go somewhere. Is that ya'll's understanding?
>
> AB [Rev. Banks]: I'm sticking to my commitment.
>
> BL: The commitment is, and what I have heard her say that what she wants from you, and that thing being gone. I don't want you moving tomorrow. That's what I'm saying, and because that is going to bring up some bunch of suspicion, okay? We don't want that. We need time.
>
> AB: We need time to relocate.
>
> BL: You see, what I am saying and the word and wait, and it is this. What we talk about here will never go any further. That is a solemn word on everybody's part, okay? And I said that because it is not going to do any one person any good to try to embarrass the other, and it is just going to raise something else up again, and then we are all in this mess over again, so if ya'll are sincere in what your agreement and you are making, that is fine with me.
>
> MB [Margie Banks]: That's right. It ain't nobody's business.
>
> BL: There was also some understanding that she feels that there is some reimbursement necessary for attorney fees. That's what your brother advises on the telephone. I think you agree to that; is that right?
>
> AB: That's correct.
>
> BL: Okay, and that is $500.00 and she has both of ya'll word.
>
> MB: Uh huh. (yes).
>
> BL: That is all to be done, is that right? Is that right, Reverend.
>
> AB: That's right.
>
> * * *

was played for Prosecutor Raff at Sheriff May's home and transcribed at the office of a private law firm with which Cahoon was associated. The prosecutors suggested the need, under the Arkansas witness bribery statute,[5] for further investigation to clarify what Patterson was being induced to do.

The next day, Sgt. Williams took a statement from Mrs. Patterson. Because of Raff's suggestion the night

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BL: * * * Like I say, ya'll know what your agreement are; ya'll don't need me, and that is why I'm telling you that if you are going to work it out, work it amongst your family so that is what it will be. The least that I have involvement in it the better because I swear to God, I don't put nothing past folks, and if they ever felt that I was intimidating anybody or trying to persuade a witness out or something or to do some stuff like that, Gene Raff — and I am going to be honest with you — that white man and me have mixed up some bad blood these last three days. It has almost gotten down to some plain out cussing. I mean it has been bad, so anything that he could right now at this point to use against me or hurt me, he would do it. It has gotten past a job to him and gotten personal; him and David — it has got past that, and anything they could do — They would send somebody wired up with tape recorders on them. I'm serious. I'm telling you, you have to watch it. If you don't believe it, just ask Jimmie Wilson, cause I'd always believe they done put folks on him. I don't want them with me standing in front of a grand jury saying I been over there siminating (?) somebody and all that kind of stuff. That's what they would do.

[5] The Arkansas witness bribery statute, Ark. Stat. Ann. §5-53-108 (1987), provides in pertinent part:

(a) A person commits witness bribery if:

(1) He offers, confers, or agrees to confer any benefit upon a witness or a person he believes may be called as a witness with the purpose of:

(A) Influencing the testimony of that person; or

(B) Inducing that person to avoid legal process, summoning him to testify; or

(C) Inducing that person to absent himself from an official proceeding to which he has been legally summoned * * *.

before, Mrs. Patterson attempted to reach Lewellen by telephone. When they eventually spoke, their phone conversation was recorded. This tape recording, identified as "E-4," contained the following statement by Lewellen:

> See, it's up you in the sense that if you and your child don't come up there, then they're going to drop it. They can't make you come to no courtroom and testify to nothing. I don't give a shit if they subpoena you. You don't have to—You can go up there and say, "I ain't got nothing to say." You understand? Huh?

Rev. Banks's rape trial resumed on Monday, September 9. Before any jurors were called, prosecutors Raff and Cahoon informed Judge Yates that there was a matter that they were required to bring to his attention. They proceeded to place on the record, in closed proceedings, their outline of the witness bribery investigation. Mrs. Patterson and Sgt. Williams testified about the alleged bribery and the investigation. Lewellen was not allowed to cross-examine these witnesses, nor did Judge Yates allow Lewellen to present witnesses in his own or Rev. Banks's behalf. Lewellen was permitted only to make a statement addressing the effect of what had transpired on Rev. Banks's rape trial.

After a brief recess, Judge Yates *sua sponte* declared a mistrial. He also stated that he intended to

send a transcript of that day's proceedings to the Arkansas Supreme Court Committee on Professional Conduct.

On September 27, Sheriff May executed an affidavit in support of an information charging Lewellen and Rev. Banks with witness bribery and conspiracy to commit witness bribery. That same day, the prosecutors presented the information to Municipal Judge Dan Felton, III. Lewellen's case was placed on the Lee County Circuit Court criminal docket and set for trial for February 7, 1986. Upon Lewellen's motion, his trial was continued to May 19, 1986.

On April 28, 1986, Lewellen brought suit in federal court against Prosecutors Raff and Cahoon, Sheriff May, Sgt. Williams, Lee County, Lafayetta Patterson, and Jeanne Kennedy. Lewellen later added as a defendant Judge Henry Wilkinson, who was due to preside over Lewellen's criminal trial in Lee County Circuit Court. Lewellen sought damages and injunctive and declaratory relief[6] under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 for alleged violations of his rights under the first, fourth, fifth, thirteenth, and fourteenth amendments. He also asserted pendent state law claims. The gist of Lewellen's complaint was that the defendants conspired to and did investigate and prosecute him because of his race and to retaliate against him for exercising his constitutional rights.

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[6] Lewellen sought only declaratory and injunctive relief against Judge Wilkinson.

After a number of continuances, Lewellen's state criminal trial was finally scheduled for November 17, 1986. On October 27, 1986, Lewellen moved the federal court for a temporary restraining order to enjoin the prosecutors and Judge Wilkinson from going forward with the state criminal trial. The district court granted this motion on November 14 and set a hearing on Lewellen's motion for a preliminary injunction.

Following a six-and-one-half-day hearing, the district court issued a preliminary injunction barring the state officials from proceeding with Lewellen's criminal trial pending adjudication of Lewellen's federal court action on the merits. *Lewellen v. Raff*, 649 F. Supp. 1229 (E.D. Ark. 1986). One week later, on December 15, 1986, the district court ruled on a number of other motions; these orders, from which various parties appeal, are discussed in succeeding sections.

II. Discussion

A. Preliminary Injunctive Relief

Prosecutors Raff and Cahoon and Judge Wilkinson appeal from the district court's entry of a preliminary injunction barring them from proceeding with the state criminal case against Lewellen. For reversal, they argue that the district court should have abstained from exercising jurisdiction, pursuant to the principles of *Younger v. Harris*, 401 U.S. 37 (1971). They also argue

that the district court applied an erroneous legal standard to determine whether the preliminary injunction should issue. We turn first to the question of *Younger* abstention.

In *Younger*, the Supreme Court held that federal courts as a rule abstain from exercising jurisdiction when asked to enjoin pending state criminal proceedings. *Id.* at 56.[7] The *Younger* abstention doctrine is a reflection of the public policy that disfavors federal court interference with state judicial proceedings. The doctrine is based on comity and federalism. *See Ronwin v. Dunham*, 818 F.2d 675, 677 (8th Cir. 1987) (citing *Younger*, 401 U.S. at 44).

Despite the concerns underlying the *Younger* abstention principle, however, in certain cases the duty of the federal courts to vindicate and protect federal rights must prevail over the policy against federal court interference with state criminal proceedings. The federal courts have consistently and repeatedly affirmed that their abhorrence of enjoining a pending state prosecution must yield when the state prosecution threatens a party with "great and immediate irreparable injury." *See, e.g., Younger*, 401 U.S. at 56; *Dombrowski v. Pfister*, 380 U.S. 479, 485-87 (1965); *Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986), *cert. denied*, 107 S. Ct.

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[7] In § 1983 cases such as this one, the doctrine is not grounded in the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), which prohibits federal injunctions against state court proceedings, because actions brought under § 1983 are within the "expressly authorized" exception to the ban on federal injunctions. See Mitchum v. Foster, 407 U.S. 225, 243 (1972).

3228 (1987); *Rowe v. Griffin*, 676 F.2d 524, 525 (11th Cir. 1982); *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981); *Munson v. Janklow*, 563 F.2d 933, 935 (8th Cir. 1977); *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975).

The requisite threatened injury must be more than simply "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution * * *." *Younger*, 401 U.S. at 46. The injury threatened is both great and immediate, however, when "defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights," *Dombrowski*, 380 U.S. at 485, or when the prosecution is initiated in bad faith or to harass the defendant. *See, e.g., Cameron v. Johnson*, 390 U.S. 611, 617-18 (1968); *Central Ave. News, Inc. v. City of Minot*, 390 U.S.F.2d 565, 568-70 (8th Cir. 1981). In the context, bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *see also Central Ave. News*, 651 F.2d at 570. Bad faith and harassing prosecution also encompass those prosecutions that are initiated to retaliate for or discourage the exercise of constitutional rights. *See, e.g., Younger*, 401 U.S. at 48 (*Dombrowski* defendants were threatened with great and immediate irreparable injury because prosecutions were initiated "to discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.") (quoting

Dombrowski, 380 U.S. at 482); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979) (per curiam) (allegation that state criminal prosecution was initiated to chill first amendment rights sufficient to remove *Younger* bar against federal court interference).

A showing that a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights "will justify an injunction **regardless** of whether valid convictions conceivably could be maintained." *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) (emphasis added). The state does not have any legitimate interest in pursuing such a prosecution; "[p]erhaps the most important comity rationale of *Younger* deference—that of respect for the State's legitimate pursuit of its substantive interests—is therefore inapplicable." *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (citations omitted).

We turn to our review of the district court's decision with these principles in mind. We can disturb the district court's decision only if its factual findings are clearly erroneous or if it committed an error of law. *See Central Ave.*, 651 F.2d at 569.

After hearing testimony and receiving documentary evidence over a six-day period, the district court made two critical factual findings that persuaded it to issue the preliminary injunction:

> Lewellen has demonstrated that the criminal prosecution initiated by Raff and Cahoon against Lewellen was brought in bad faith for the purpose of retaliating for the exercise of his constitutionally protected rights. This Court is of the opinion that the criminal charges instituted against Lewellen would not have been filed absent the desire to retaliate against Lewellen for exercising his federally protected rights.

Lewellen v. Raff, 649 F. Supp. 1229, 1232 (E.D. Ark. 1986). Although the district court's opinion is somewhat cryptic as to the precise bases for these findings, based on our review of the record, we cannot say that they are clearly erroneous.

The allegations in Lewellen's complaint painted a picture of pervasive racism and discriminatory treatment of blacks in the Lee County court system. Lewellen alleged that he, as a black attorney, had received disparate treatment from that accorded white attorneys by both the prosecutors and the closely-aligned circuit court judges. He claimed that the prosecutors initiated charges against him: (1) because of his race; (2) because he had vigorously attempted to defend his client, Rev. Banks, against the rape charge; and (3) because they wished to thwart Lewellen's campaign for state office against a political ally of Sheriff May.

In support of these allegations, Lewellen presented the testimony of eight witnesses at the preliminary injunction hearing. The district court credited the testimony of Lewellen and Sam Blount, a local businessman, as supporting the allegation that the prosecution was initiated because of the prosecutors' desire to retaliate against Lewellen for his vigorous defense of Banks. The district court relied on the following evidence:

> Lewellen testified that during the jury selection in the rape case he was defending, he objected to the procedure being employed by the trial judge and received a strong admonishment from the trial judge in open court; that later, he saw the trial judge and Raff eating lunch together in the Lee County jail and advised the trial judge that he, Lewellen, wanted to renew his objections to the jury selection procedure when the trial resumed. Again the trial judge harshly rebuked Lewellen for questioning the judge's integrity. Lewellen states that this is the conduct that displeased Raff and the judge.

* * *

> Lewellen also testified that Sheriff May advised him that he needed to take steps to apologize to the trial judge and Raff if he wanted, in effect, to get back in their good graces and minimize

> the consequences that could flow from Lewellen's criminal case.
>
> * * *
>
> Lewellen testified that Sheriff May advised him that he, Lewellen, should go to Raff and apologize and that he could avoid some of the difficulties confronting him. Lewellen further testified that Sheriff May said that in 1972, when May was under investigation by a Lee County Grand Jury, May went to Raff and apologized to Raff and "Gene fixed the Grand Jury."

Lewellen, 649 F. Supp. at 1232 and n.4, 1234.

The testimony of Sam Blount also supports the district court's finding of retaliatory prosecution. Blount testified that Sheriff May said, in effect, that criminal charges might be brought against Lewellen because the prosecutors were displeased by Lewellen's conduct of the defense of Banks in the state rape trial.[8]

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[8] The questioning of Sam Blount was as follows:

> Q. [By Mr. Hairston, attorney for Lewellen] Okay. Now, you had a discussion about some potential charges, then, with Sheriff May?
>
> A. That's correct.

As evidence that Lewellen's prosecution was initiated at least in part because Lewellen is black,

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Q. Did Sheriff May indicate to you why such charges might be brought against plaintiff Lewellyn [sic]?

A. Yes, he did.

Q. And what did he say?

A. The sheriff explained when I was in his office that attorney Lewellyn [sic] had a manner the day before or a couple of days before during a court session that was very much unprofessional and unruly for a court or for a court officer.

Q. Now, did you execute an affidavit in this matter?

A. Yes, sir, I did.

Q. Do you recall what you put in that affidavit?

A. Yes, sir.

Q. What was that, sir?

A. That the sheriff emphasized, his emphasis were that he was very, very disappointed and that he thought that Bill had done some things that would cause the prosecutor of our county, as well as the judge, to not cooperate with him during the court session. I understand that they were overruling all of attorney Lewellyn's [sic] objections, and that was basically how I received, from my intelligence, that was the payback situation.

Q. Did he indicate to you that the conduct of Mr. Lewellyn [sic] during that court session you referred to towards defendant Raff and Cahoon might cause some problems for Mr. Lewellyn [sic], some legal problems for Mr. Lewellyn [sic]?

A. Yes, sir, that he very well may be charged.

Q. Okay. Do you remember any specific language that Sheriff May used in terms to indicate the nature of the conduct?

A. Yes, sir, I think he said he had shown his butt in the courtroom, how he had acted and that he had pissed everybody off. And I think that "everybody" was to include the officers of the court, the prosecutor, deputy prosecutor and the judge.

the district court referred to the testimony of Neal, an attorney who had practiced law in Lee County for approximately seven years. *Lewellen*, 649 F. Supp. at 1233 n.8. Neal testified about the disparate treatment black attorneys were subjected to by Raff and Cahoon. The district court also stated that "the evidence describe[s] an environment in which Lewellen will not be assured adequate vindication of due process and equal protection in the Lee County Circuit Court * * *." *Id.* at 1233.

Finally, as evidence that Lewellen's prosecution was motivated by the prosecutors' desire to retaliate for and discourage Lewellen's exercise of his first amendment rights, the district court found that:

> The scheduling of Lewellen's criminal case for trial on October 10, 1986, for November 17,

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Q. What was the payback situation, sir?

A. That was the lack of cooperation by anybody that day because of how attorney Lewellyn [sic] had acted.

Q. Would you repeat that?

A. The statement was made that all of his objections were overruled. I'm not an attorney so I'm just trying to relate it how I recollect it. That all of his objections were overruled and that he was not able to get anything across during the court session because of how he had act, and that was kind of the payback to the point that the court was not listening to anything attorney Lewellyn [sic] was saying.

* * *

Q. Was there any discussion concerning any possible criminal charges that might be brought against Mr. Lewellyn [sic]?

> 1986, took place twenty-four (24) days prior to the General Election conducted on November 4, 1986, in which Lewellen was running as an Independent against a Democratic incumbent, when Lewellen was defeated. This Court is of the opinion that there is a strong likelihood that Lewellen can establish that his opponent in the senatorial race made reference to this scheduling during the campaign, and that the scheduling was calculated to impede and impair his First Amendment rights.

Id. at 1232 n.5.[9]

The state officials argue that all of these findings are clearly erroneous, or, even if not erroneous, irrelevant, because "[t]he sole issue before this Court is whether the prosecutors had a reasonable expectation of obtaining a valid conviction of Lewellen." We disagree with both assertions.

> A. I think it was — I think the statement was insinuated by the sheriff that there were possibly some charges that may be brought against attorney Lewellyn [sic] unless he rectified the situation by going back and making an apology is what I think that the intentions were.

Transcript at 275-77.

The district court did not specifically refer to this testimony in its opinion; nevertheless, it is our duty to examine the entire record to determine if the district court's findings of retaliatory prosecution is clearly erroneous. See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985).

[9] We note that it is not clear that Lewellen would be able to raise these issues as defenses to a witness bribery charge. Cf. Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981).

First, the district court's findings are not irrelevant. The "bad faith and harassment" exception to the *Younger* abstention doctrine is applicable when criminal prosecutions are instituted for impermissible purposes.[10] All of the district court's findings are directed toward that ultimate issue.

Moreover, it is of no significance that the district court's findings concerning the impermissible purposes

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[10] In a thorough and thoughtful opinion, H. Lee Sarokin, a distinguished federal district judge, recently surveyed the types of impermissibly-motivated state prosecutions that have been held enjoinable under the bad faith exception to the Younger doctrine:

> courts have found bad faith where prosecutors have instituted charges in violation of a prior immunity agreement, Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); where a prosecutor has pursued highly questionable charges against the plaintiff apparently for the sole purpose of gaining publicity for himself, Shaw v. Garrison, 467 F.2d 113 (5th Cir.), cert. denied, 409 U.S. 1024, 93 S. Ct. 467, 34 L.Ed.2d 317 (1972); where a prosecution is motivated by a purpose to retaliate for or to deter the filing of a civil suit against state officers, Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979); and, specifically, where a prosecution has been instituted to harass and punish the federal plaintiffs having exercised their first amendment rights in criticizing public officials. Fitzgerald v. Peek, 636 F.2d 943 (5th Cir.) (per curiam), cert. denied, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981); see also Herz v. Degnan, 648 F.2d 201, 209-10 (3d Cir. 1981) (state Attorney General's institution of license revocation proceeding on grounds for which no authority existed strongly suggested that "bad faith" exception to Younger principle would apply, if Younger were relevant to proceeding in question); Bishop v. State Bar of Texas, 736 F.2d 292 (5th Cir. 1984); Heimbach v. Village of Lyons, 597 F.2d 344, 347 (2d Cir. 1979); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975). The threat of multiple prosecutions may be additional evidence of bad faith, see, e.g., Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972), but is not inevitably required to establish bad faith. Fitzgerald v. Peek, 636 F.2d at 944; Wilson v. Thompson, 593 F.2d at 1381. An injunction may also issue to enjoin consideration of charges by a demonstrably biased tribunal. Gibson v. Berryhill, 411 U.S. 564, 577 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).
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> Wichert v. Walter, 606 F. Supp. 1516, 1521 (D.N.J. 1985).

behind the prosecution are irrelevant to the issue of whether the prosecutors had a reasonable expectation of obtaining a conviction. As stated by the Fifth Circuit, "[a] bad faith showing of this type [—retaliation prosecution—] will justify an injunction **regardless** of whether valid convictions conceivably could be obtained." *Fitzgerald*, 636 F.2d at 945 (emphasis added); *see also Bishop v. State Bar*, 736 F.2d 292, 294 (5th Cir. 1984); *cf. Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (preliminary injunction of state criminal proceeding permissible if : (1) conduct retaliated against is constitutionally protected; and (2) prosecution is motivated at least in part by purpose to retaliate or deter). Because we find that the district court's finding of retaliatory prosecution is not clearly erroneous, we therefore need not and do not address the issue whether the prosecutors entertained a reasonable expectation of obtaining a conviction of Lewellen.

Second, we cannot agree with the state officials that the district court's findings are clearly erroneous. The district court credited the testimony of, among others, Lewellen, Neal, and Blount. As the Supreme Court has admonished,

> [w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding,

> if not internally inconsistent, can virtually never be clear error.

Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985). We conclude that the district court's factual findings were not clearly erroneous and that they adequately support its decision to issue a preliminary injunction.

The state officials also argue that the district court applied an erroneous legal standard in deciding to issue the preliminary injunction. They claim that the district court employed the general *Dataphase* standard for assessing propriety of injunctive relief rather than the more stringent standard required by *Younger*. *See Dataphase Sys., Inc. v. C. L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (four considerations are irreparable harm, balance of harms, probability of success on merits, and public interest). We disagree.

We first note that other cases in this circuit have used the traditional preliminary injunction standard even in the *Younger* abstention context. *See Munson v. Gilliam*, 543 F.2d 48, 52 (8th Cir. 1976) (in case where *Younger* abstention was at issue, court stated that "[t]he grant of a preliminary injunction requires a showing of a strong likelihood of eventual success on the part of a grantee and a showing of irreparable harm * * *.").

Moreover, the *Younger* standard and the general standard for injunctive relief are closely related,

being based on similar equitable principles. They differ in that the *Younger* standard requires a showing of "great and immediate" irreparable injury. We agree with the state officials that the district court's opinion somewhat confusingly mingles discussion of the two standards. Nevertheless, the district court clearly applied the stringent "great and immediate irreparable injury" requirement, because it expressly made the factual findings necessary for a showing of great and immediate irreparable injury.

The state officials have also appealed from the district court's denial of their motion for summary judgment with respect to injunctive relief. For the foregoing reasons, we affirm this order.

B. Prosecutorial Immunity

In an unpublished order issued one week after the preliminary injunction, the district court granted Raff and Cahoon absolute immunity from damages on Lewellen's defamation claim. The court also granted Raff and Cahoon qualified immunity with regard to causes of action arising out of their role in the electronic surveillance of Lewellen. Lewellen appeals from these orders.

Lewellen attempted to state a cause of action against Raff and Cahoon for defamation,[11] claiming that

[11] Lewellen refers to this cause of action as "federal defamation," but we do not address his assertion that "defamation plus the violation of a substantive Due Process right states a claim under section 1983."

they were responsible for release and publication of the tape recordings that purportedly established Lewellen's participation in witness bribery. The district court found that "the information which [Lewellen] contends is defamatory was disclosed by Raff and Cahoon during judicial proceedings in connection with the Banks trial." Based on *Imbler v. Pachtman*, 424 U.S. 409 (1976), the district court concluded that the prosecutors were entitled to absolute immunity from damages on this claim. We agree.

In *Imbler*, the Supreme Court held that prosecutors are absolutely immune from damages claims arising out of their activities in initiating and presenting that state's case. *Id.* at 431. Here, the only evidence of release of the tapes by the prosecutors was that they played the tapes for Judge Yates during Rev. Banks's trial, so Judge Yates could decide if attempts had been made improperly to influence a witness. Such an activity is clearly "intimately associated with the judicial phase of the criminal process" and thus cannot give rise to prosecutorial liability. *Id.* at 430.

Lewellen also claimed that prosecutors Raff and Cahoon directed and participated in the allegedly illegal electronic surveillance of him. The district court found that the prosecutors were not entitled to absolute immunity on this claim because the surveillance was "investigative rather than judicial in nature." The court found that the prosecutors were entitled to qualified

immunity, however, because their conduct did not violate any clearly established law.

Lewellen contends that the district court erred in finding the prosecutors qualifiedly immune. The prosecutors responded that they should have been held entitled to absolute immunity, but, if not, then the court was correct in finding them qualifiedly immune. We agree with the prosecutors that they are entitled to absolute immunity on these claims.

Most of the allegations in Lewellen's complaint are facially insufficient to deprive the prosecutors of absolute immunity. The activities complained of —receiving complaints of criminal conduct, listening to tape recordings, reviewing statutes—are all part of a prosecutor's familiar and traditional role of reviewing evidence and deciding whether to initiate a prosecution. As such, they are absolutely shielded from giving rise to liability for damages. *See Imbler*, 424 U.S. at 430-31 and n.33.[12]

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[12] Two more troublesome allegations may be disposed of quickly because there is simply no evidence in the record that Raff ordered the initial electronic surveillance or directed that the state police should use electronic surveillance. The record indicates that it was Sheriff May's decision to request that devices for electronic surveillance be brought by the state police. Similarly, the testimony of Sgt. Williams indicates that it was his idea, during conversation with Raff, that a telephone conversation between Lewellen and Mrs. Patterson be recorded. Thus, Lewellen cannot avoid summary judgment against him on these claims because he produced no genuine material facts to substantiate his allegations.

Lewellen's more problematic allegation is that Deputy Prosecutor Cahoon assisted personally in the surveillance and taping of Lewellen's and others' conversations. It is undisputed that Cahoon rode in the car with Sgt. Williams and Sheriff May when tapes E-1 and E-2 were made; Sgt. Williams operated the receiving and recording device. Sgt. Williams testified that at one point during the evening, when Mrs. Patterson left her house, wearing the microphone, to go to Lewellen's office, Cahoon joined Mrs. Patterson in her car and spoke with her.

Although it is a close question, we hold that Cahoon is entitled to absolute immunity for these activities, based on our recent decision in *Williams v. Hartje*, 827 F.2d 1203, 1210 (8th Cir. 1987). In *Williams*, we held that a prosecutor was immune from damages for claims arising out of his interviews with prison inmates conducted to determine if they had any knowledge of the circumstances of the death of an inmate. The prosecutor's investigation was undertaken to obtain evidence for a coroner's inquest scheduled for the following day—a proceeding held by this court to be quasi-judicial in nature. We stated that "investigation to secure the information necessary to the prosecutor's decision to initiate criminal proceedings is within the quasi-judicial aspect of the prosecutor's job and therefore is absolutely immune from civil suit for damages." *Id.*

Cahoon's participation in the electronic surveillance of Lewellen falls squarely within the scope of this holding in *Williams*. Mrs. Patterson, a prosecution witness in a trial then being conducted by Cahoon, had alleged that various parties were attempting to bribe her; the electronic surveillance was conducted to determine whether criminal charges should be lodged against those parties. Moreover, Cahoon's actions were undertaken to protect Mrs. Patterson, a key witness at Rev. Banks's rape trial, and to insure her attendance and testimony at trial. These actions are also within the scope of a prosecutor's duties and thus can not give rise to liability for damages. *See Myers v. Morris*, 810 F.2d 1437, 1447 (8th Cir.), *cert. denied*, 102 S. Ct. 97 (1987); *cf. Imbler*, 424 U.S. at 430 n.32 (efforts to control the presentation of witnesses' testimony fall within immunized prosecutorial functions). We hold, therefore, that prosecutors Raff and Cahoon are absolutely immune from liability for any damages caused by their participation in the investigation of Lewellen.[13]

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[13] Lewellen also suggests in his brief that Raff and Cahoon are not entitled to immunity because they somehow participated in the alleged "editing" of tape E-1. He urges us to "infer" that Raff and Cahoon ordered or consented to this alleged editing, which purportedly resulted in the destruction of exculpatory evidence and the creation of incriminating evidence. Lewellen did not raise this allegation in his complaint, nor was it discussed at all in the parties' briefs to the district court on the immunity issue. The district court therefore has never ruled on this claim and it would be inappropriate for us to do so. The proper course would have been for Lewellen to amend his complaint; having failed to do so, he may not on appeal raise new claims. See, e.g., Spear v. Dayton's, 771 F.2d 1140, 1144 (8th Cir. 1985).

Lewellen also appeals from the district court's order barring discovery against Raff and Cahoon except as to one limited issue. We affirm this order because we have

C. Immunity of Police Officers

Sgt. Williams and Sheriff May filed motions to dismiss or for summary judgment on the basis of qualified immunity. The district court in large part denied these motions, stating that "[t]he Court cannot find that [Williams and May] did not violate clearly established statutory and constitutional rights which a reasonable person would have known." Williams and May appeal from the denial of their motions; we reverse. We discuss their motions as they relate to each of the counts the district court did not otherwise dismiss.[14]

In Count One of his complaint, Lewellen purports to state causes of action under 42 U.S.C. §§1981 and 1983, claiming that Williams and May violated his rights under the first, fourth, fifth, thirteenth, and fourteenth amendments by: (1) conducting an illegal search and seizure; (2) unlawfully arresting and prosecuting him; (3) violating his freedom to engage in his profession without

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determined that Raff and Cahoon are entitled to absolute immunity and because Lewellen has made no showing that he was prejudiced by the order. See, e.g., Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977) (district court's discovery rulings not reversible unless shown to be a gross abuse of discretion resulting in fundamental unfairness).

[14] The district court granted Williams's and May's motions to dismiss Lewellen's punitive damages and state tort claims, and claims under the federal communications interception statute. Although the court went on to say that it was not dismissing the claims against Williams and May under Count 7, the only claims contained in Count 7 were brought under the federal communications interception statute. We therefore dismiss Count 7 as it applies to Williams and May.

discrimination due to his race; and (4) violating his rights of association and to be a candidate for public office.

The first claim, for illegal search and seizure, based on May's and Williams's roles in the taping, must be dismissed. Lewellen claims that the electronic surveillance activities violated federal and state communications interception statutes. Yet the federal statute, 18 U.S.C. §§ 2510-2520 (as amended through Supp. 1986), was not violated because Mrs. Patterson, one of the parties to the conversations issue, had consented to the interception.[15]

Lewellen argues further that the federal statute incorporates stricter provisions of state law, and that an Arkansas statute then in effect required judicial authorization prior to interception of communications. 1985 Ark. Acts 666, 707 (repealed 1986) (formerly codified at Ark. Stat. Ann. §§ 41-4501-4509 (Supp. 1985)). All parties concede that the tape recordings at issue did not have prior judicial authorization. The Arkansas statute was repealed and voided *ab initio*, however, one year after it was passed, *see* 1986 Ark. Acts

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[15] 18 U.S.C. § 2511 (2) (c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

1, because the General Assembly determined that there was too much confusion over the meaning of the statute. *Id.* at §2. In such a case, it cannot be said that the statute represented "clearly established" law. Finally, "Fourth Amendment rights are not violated when * * * conversations with a government informant are electronically monitored by a government agent with the consent of the informant." *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). For these reasons, Lewellen's claim against May and Williams for illegal electronic surveillance must be dismissed.

The second claim, for unlawful arrest and prosecution, must be dismissed as to Williams because Lewellen did not allege or produce any facts to indicate that Williams was involved in these aspects of the investigation of Lewellen. In his brief, Lewellen argues that Williams created false evidence and destroyed exculpatory evidence "in order to maliciously prosecute Lewellen." Lewellen did not raise these allegations in his complaint, nor did he ever respond to Williams's motion for summary judgment, so this is the first time a court has been asked to rule on these claims. Likewise, Lewellen raises these allegations with respect to Sheriff May for the first time on appeal. In these circumstances, we decline to pass on claims that are raised for the first time on appeal, and Lewellen's claims for unlawful arrest and prosecution must fail.

Finally, Lewellen's third and fourth claims under this count must also be dismissed. Lewellen did not demonstrate any genuine issues of material fact to support his allegations that Williams and May deprived him of his freedom to engage in a profession and violated his right to be a candidate for political office; he does not even address these issues in his briefs on appeal. Lewellen asserts in his complaint that May "tried to convince [Lewellen] that he should not run for the State Legislature." Assuming this to be true, it does not rise to the level of a violation of Lewellen's first amendment rights. Count 1 must therefore be dismissed in its entirety as it applies to Williams and May.

Count Two of Lewellen's complaint alleged that Williams and May violated 42 U.S. §§1983 and 1985 by conspiring to entrap him in frivolous criminal charges and to cover up that conspiracy, for the purpose of depriving him equal protection due to his race. Without detailing all of the arguments made by the parties with respect to this issue, we find that Lewellen failed to satisfy his burden, as the nonmoving party, to survive a motion for summary judgment. Because Lewellen's section 1985 claim must be dismissed, his section 1986 claim against May, contained in Count 3, must likewise be dismissed. *See Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981) (cause of action under §1986 is dependent on valid claim under §1985).

The final claim that survived Williams's and May's motions was that Williams and May conspired with other defendants to deprive Lewellen of equal protection and hinder him from obtaining a fair trial, in violation of 42 U.S.C. §1985(2). Underlying this claim is Lewellen's assertion that Williams and May threatened Joe Patterson, a possible defense witness in Lewellen's state criminal case. According to Lewellen, Williams and May threatened Joe Patterson with charges of bribery and perjury in an attempt to intimidate and coerce him into making false incriminating statements against Lewellen.[16]

This claim must fail, however, because Lewellen has not alleged or produced any facts to demonstrate that such witness intimidation, if it occurred, was prompted by a racial or class-based invidiously

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[16] These allegations do not state a claim under the first clause of § 1985 (2), which makes it unlawful for "two or more persons in any State or Territory [to] conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully." See Kush v. Rutledge, 460 U.S. 719, 721 n.1 (1983) (first clause of § 1985 (2) relates to witness intimidation in connection with federal proceedings). They do, however, state a claim under the second clause of § 1985 (2), which makes it unlawful for "two or more persons [to] conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with the intent to deny to any citizen the equal protection of the laws * * *." See Id. (second clause of § 1985 (2) applies to witness intimidation in state court proceedings).

In Deretich v. Office of Administrative Hearings, 798 F.2d 1147, 1153 (8th Cir. 1986), this court stated that "section 1985 (2) does not provide a cause of action for intimidation of witnesses in state administrative and court proceedings." That statement must be understood in the context of that case, however, no racial or class-based discriminatory animus had been shown there.

discriminatory animus. *See Kush v. Rutledge*, 460 U.S. 719, 725 (1983). We note, moreover, that Lewellen has failed to argue in support of or even mention this claim in his briefs.

III. Conclusion

We affirm the district court's grant of a preliminary injunction; a hearing on Lewellen's claim for a permanent injunction should be held promptly. We hold that prosecutors Raff and Cahoon are absolutely immune from liability for damages, and affirm the protective order limiting discovery against them. Finally, we reverse the denials of Williams's and May's motions for summary judgment, finding that they are entitled to qualified immunity on all counts.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

ROY C. LEWELLEN, JR., ET AL PLAINTIFFS

v. No. H-C-86-34

GENE RAFF, Individually and In His Capacity as Prosecuting Attorney for The First Judicial District of Arkansas, ET AL DEFENDANTS

MEMORANDUM OPINION AND ORDER
GRANTING PRELIMINARY INJUNCTION

Roy C. Lewellen, Jr., Esq. has petitioned this Court for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, enjoining Circuit Judge Henry Wilkinson, Prosecuting Attorney Gene Raff and Deputy Prosecuting Attorney David Cahoon of the First Judicial District, Lee County, Arkansas, from conducting a trial of the criminal action styled *State of Arkansas v. Roy C. Lewellen*, No. 85-50, currently pending in the Lee County Circuit Court. Lewellen is charged with the criminal offense of "Attempted Witness Bribery," a Class C felony which imposes a sanction of not less than three years nor more than ten years in the

Arkansas Department of Correction and a fine not exceeding $10,000.00, and alternatively, Criminal Conspiracy, a Class D felony, which imposes a sanction not to exceed six years in the Arkansas Department of Correction, and a fine not exceeding $10,000.00.[1]

Lewellen instituted this action on April 28, 1986, seeking injunctive and declaratory relief and damages against Raff and Cahoon, as well as others.[2] At the time, Lewellen's criminal case had been continued for trial on February 7, 1986, to May 19, 1986.

On May 14, 1986, Lewellen applied to this Court for a temporary restraining order to enjoin Raff and Cahoon from proceeding to trial on May 19, 1986, in the state action following the denial of Lewellen's request for a continuance by the state trial judge.

On May 14, 1986, this Court conducted a hearing on Lewellen's request for a temporary restraining order, and at the conclusion of the hearing, directed counsel to submit memoranda briefs on May 15, 1986. However,

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[1] On November 14, 1986, this Court entered an order temporarily restraining a scheduled trial of the case on November 17, 1986. A hearing on Lewellen's request for a preliminary injunction commenced on November 24, 1986. The temporary restraining order was extended an additional ten days by this Court sua sponte on November 25, 1986.

[2] Judge Henry Wilkinson was made a party defendant to these proceedings pursuant to Lewellen's amended complaint on September 23, 1986. Only declaratory judgment and injunctive relief are sought against Judge Wilkinson.

the Court was advised on May 15, 1986, that the parties and counsel had agreed that the state criminal trial would be continued pending a hearing on the merits of this action by this Court. The state trial judge, by order dated May 15, 1986, continued the state criminal trial for that term. Accordingly, this Court entered an order on May 16, 1986, permitting Lewellen to withdraw, without prejudice, his request for a temporary restraining order.

This case was scheduled for trial on the merits for September 8, 1986, but was continued at the request of Lewellen because his counsel had been directed to appear in the Court of Appeals for the Eighth Circuit in an unrelated proceeding before that Court.

On October 10, 1986, during pre-trial docket call, Judge Wilkinson, **at the request of Cahoon,** but over the objections of Lewellen's state court counsel, scheduled Lewellen's criminal action for trial on November 17, 1986.[3]

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[3] During the pre-trial docket call by Judge Wilkinson, L. Ashley Higgins, one of Lewellen's attorneys in the state criminal case, requested Judge Wilkinson to recuse in that action since Judge Wilkinson had been made a party defendant in this proceeding. While the record does not reflect what action, if any, was taken by Judge Wilkinson on counsel's recusal request, it is clear that Judge Wilkinson stated "[t]he court is going to set the matter for trial" because the federal district court action had not been concluded.

This Court is persuaded and so finds that all counsel concerned in both the state criminal proceeding and this action agreed that Lewellen's state criminal case would not proceed to trial until after this Court had concluded a trial on the merits in this proceeding. It is plain and beyond debate that a litigant cannot complain subsequently about a procedure to which he has consented.

On October 27, 1986, Lewellen filed his supplemental motion for a temporary restraining order following his counsel's inability to get the November 17th trial setting continued.

Lewellen, a black attorney residing and engaged in general practice of law in Eastern Arkansas, has alleged, among other things, the following in support of his request for injunctive relief:

> 1. That the criminal bribery charges, instituted against him by way of an information by Raff and Cahoon, is a bad faith prosecution designed and calculated to harass and retaliate against him because "he is a black attorney who vigorously defended his client [in a state criminal proceeding in Lee County Circuit Court wherein Raff and Cahoon are serving as prosecutors and Lewellen as defense counsel], that he has a growing legal practice, and is a candidate for political office running against a political ally of defendant Sheriff May."
>
> 2. That Raff and Cahoon, as prosecutors, have a history of treating black attorneys differently than white attorneys and have pursued a course of retaliation in the pending state criminal proceeding against Lewellen and "other cases."

3. " . . . Defendants . . . acted willfully, knowingly, purposely, and in bad faith with the specific intent to deprive the plaintiff . . . of his right to be free from illegal search and seizure; free from unlawful arrest and prosecution without evidence in support thereof; freedom to engage in his chosen line of employment and profession without discrimination on the basis of his race; and, his right to freedom of association and political affiliation and candidacy for public [office] . . . " (Paragraph 88 of amended complaint).

4. That Raff and Cahoon engaged in electronic surveillance without legal justification and judicial warrant in order to obtain evidence to establish probable cause for the state criminal proceeding.

5. That Raff and Cahoon caused the publication of defamatory material before the state criminal charges were filed and in the midst of an ongoing investigation by the defendants of the purported charges; that Raff and Cahoon are currently pursuing a course of retaliation against Lewellen.

After scrutinizing the circumstances surrounding the institution of the criminal charges against Lewellen by Raff and Cahoon, from the evidence received during

a hearing involving approximately six (6) days, this Court makes the following additional findings:

Lewellen claims and asserts that the criminal charges instituted against him were instituted in bad faith in order to harass, intimidate and retaliate against him and without an expectation of a valid conviction of such charges because of his race and Lewellen's refusal to engage in plea bargaining with regard to a client charged with the crime of rape and demanded that his client be afforded a speedy jury trial to the end that his client's guilt or innocence be determined without delay; because of Lewellen's decision, against the advice of Sheriff May, to run as a candidate for a state senatorial position against an incumbent who was a friend and ally of the County Sheriff; and because Lewellen was critical of and resisted the disparate treatment accorded black attorneys by public officials in the administration of justice in Lee County, Arkansas, as contrasted with the recognition afforded white attorneys.

An example articulated by Lewellen of the alleged disparate treatment, in the administration of Justice in Lee County, is the evidence that the trial court denied virtually every pretrial discovery motion filed by Lewellen seeking materials from the prosecuting attorney to the end that Lewellen might adequately prepare for the defense of his client in the pending rape trial. Sam Blount testified that Sheriff May told him that the state trial judge had denied all of Lewellen's pretrial

motions in the rape case because the trial judge was displeased with Lewellen's demeanor and conduct in his court.[4] Lewellen also testified that Sheriff May advised him that he needed to take steps to apologize to the trial judge and Raff if he wanted, in effect, to get back in their good graces and minimize the consequences that could flow from Lewellen's criminal case.

The Court notes that there is a strong likelihood that Lewellen will establish that the criminal charges lodged against him were attended with undue publicity resulting in impairment of first amendment rights.

The Court is of the opinion that the purported conduct retaliated against or sought to be impeded involve federal rights secured under the Federal Constitution;[5] Lewellen has demonstrated that

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[4] Lewellen testified that during jury selection in the rape case he was defending, he objected to the procedure being employed by the trial judge and received a strong admonishment from the trial judge in open court; that later, he saw the trial judge and Raff eating lunch together in the Lee County jail and advised the trial judge that he, Lewellen, wanted to renew his objections to the jury selection procedure when the trial resumed. Again the trial judge harshly rebuked Lewellen for questioning the judge's integrity. Lewellen states that this is the conduct that displeased Raff and the judge.

[5] The Court notes that the scheduling of Lewellen's criminal trial on October 10, 1986, for November 17, 1986, took place twenty-four (24) days prior to the General Election conducted on November 4, 1986, in which Lewellen was running as an Independent against a Democratic incumbent, when Lewellen was defeated. This Court is of the opinion that there is a strong likelihood that Lewellen can establish that his opponent in the senatorial race made reference to this scheduling during the campaign, and that scheduling was calculated to impede and impair his First Amendment rights. This, of course, can be determined during a hearing on the merits in this proceeding.

the criminal prosecution initiated by Raff and Cahoon against Lewellen was brought in bad faith for the purpose of retaliating for the exercise of his constitutionally protected rights. This Court is of the opinion that the criminal charges instituted against Lewellen would not have been filed absent the desire to retaliate against Lewellen for exercising his federally protected rights. Therefore, this Court is persuaded that Lewellen has established that unless the requested relief is granted he will suffer great and immediate irreparable harm. *See, Munson v. Janklow*, 563 F.2d 933 (8th Cir. 1977). This Court is further persuaded that the injury Lewellen faces is something more than the incidental inconvenience and injury that every defendant confronts in a criminal prosecution brought lawfully and in good faith. Here, Lewellen has demonstrated that the state prosecution against him was brought in bad faith for the purpose of retaliating and harassing him for the exercise of constitutionally protected rights.

Lewellen has demonstrated that Raff and Cahoon had no expectation of a valid conviction when they lodged the charges against Lewellen, and thus, there is a substantial likelihood that Lewellen will prevail on the merits.

The Court notes that the evidence reflects that Raff, after hearing the alleged tape recording of statements made by Lewellen, Defendants' Exhibit E-2 which is central to the criminal charges lodged against

Lewellen, stated, in essence, that the tape was insufficient to support a charge of witness bribery under Arkansas Law and directed Sheriff May and State Police Officer Williams to engage in further electronic surveillance which was immediately done.[6] But, in the opinion of this Court, the supplemental taping when considered together with Defendants' Exhibit E-2 does not alter the Court's belief that there is a substantial likelihood that Lewellen will prevail in establishing that Raff had no reasonable expectation of getting a conviction of Lewellen. The poor quality and the unexplained gaps in the tape as well as the testimony of Mr. Patterson, one of the alleged participants in the taped conversations, that there are certain deletions and alterations in the tape persuade this Court that there is a strong likelihood that Lewellen will be successful in demonstrating the lack of any probative value flowing from Defendants' Exhibit E-2 and the supplemental taping, or demonstrate that the prejudicial effects flowing from the use of the tapes outweigh any probative value.

In addition, there is a strong likelihood that Lewellen can demonstrate that it is a fairly common

[6] The Court notes that at the time the electronic surveillance was conducted, which has been conceded by all was done without a judicial warrant, Act 707 (Ark. Stat. Ann. 41-4501, et seq.), passed in 1985 by the Arkansas General Assembly, required court approval prior to any interception of wire or oral communications. Whether this requirement is relevant or material in any way to Lewellen's request for injunctive relief can be determined at the time the Court conducts the final hearing to determine whether Lewellen is entitled to a permanent injunction.

practice in Arkansas for lawyers to serve as intermediaries in seeking to have criminal charges pending against a client "dropped" or "nol prosed" which Lewellen contends was the only role that he played resulting in the criminal charges lodged against him.[7]

In balancing the equities between Lewellen and defendants in considering whether a preliminary injunction should or should not be granted, the Court is persuaded that the harm likely to be visited upon Lewellen, if the requested relief is not granted, outweighs any injury to defendants if the state criminal proceeding is enjoined pending a final determination of this proceeding on the merits.

Lewellen's complaint and the evidence describe an environment in which Lewellen will not be assured adequate vindication of due process and equal protection in the Lee County Circuit Court for it is asserted that the judiciary in Lee County is flawed and is not an independent branch of the county government;[8]

---

[7] Ollie Neal, personal attorney for Mrs. Patterson, the State's key witness in Lewellen's criminal case, testified that Lewellen "never made me any kind of offer, any kind of deal," but Lewellen had stated that Lewellen had heard that the prosecuting witness, Mrs. Patterson, wanted to have the charges dismissed.

[8] Ollie Neal, an attorney who has practiced law in Lee County for approximately seven years, testified "[i]f Gene [Raff] is not happy with you, you are not going to get a continuance because of Raff's influence over the court. Gene uses that to bring you in line. It is clear to me that Judge Yates is controlled by Mr. Raff and that Judge Wilkinson is most responsive." Neal testified further that on occasions he has observed "Raff and Judge Yates going to court in the same car;" that Raff, Cahoon and Circuit Judges Yates and Wilkinson treat black lawyers differently than white lawyers.

and that the prosecutorial power is so strong that its abuse will have such a detrimental effect upon Lewellen before a state proceeding terminates.[9] This Court is persuaded that there is a strong likelihood that Lewellen will be successful in establishing this claim in a hearing on the merits.

The Court is further persuaded that the public's interest in the maintenance and enhancement of a criminal justice system free of bad faith and harassment would, indeed, be implemented and furthered.

Sheriff May testified that he can recall that the Lee County Grand Jury has been summoned only once to consider a criminal matter under investigation during his twelve years as sheriff of Lee County, and that this was the time that he was being investigated for gambling, while serving as sheriff, and the Grand Jury exonerated him by a vote of 14 to 2.

Lewellen testified that Sheriff May advised him that he, Lewellen, should go to Raff and apologize and

---

[9] As an illustration of the power possessed, in addition to his duties as Prosecuting Attorney for the First Judicial District, Mr. Raff is a member of the Arkansas State Police Commission which possesses the responsibility to approve or disapprove promotion or demotion of state police personnel, and review each application for employment presented to the commission by the Director for certification to the eligibility list . . . to hear appeals and approve, or disapprove, any disciplinary action taken against an employee by the Director that results in transfer or loss of rank, pay or seniority. [Ark. Stat. Ann. 42-403.2 (Repl. 1977)].

These two public positions are held simultaneously by Mr. Raff as a consequence of a purported Legislative Act passed by the Arkansas General Assembly.

that he could avoid some of the difficulties confronting him. Lewellen further testified that Sheriff May said that in 1972, when May was under investigation by a Lee County Grand Jury, May went to Raff and apologized to Raff and "Gene fixed the Grand Jury."

Indeed, this Court is of the view that no benefit will be derived by giving deference to the state proceeding in which the trial judge, moreover, has previously stayed the criminal proceedings pending an adjudication of the merits in this proceeding. Moreover, this Court is persuaded that the State of Arkansas "does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights." *Wilson v. Thompson*, 593 F.2d 1383 (5th Cir. 1979). In this regard, the Court in *Wilson, supra*, observed:

> State officials disposed to suppress speech could easily do so by bringing oppressive criminal actions pursuant to valid statutes rather than by enacting invalid statutes or using other parts of the state legal machinery, and §1983 would give no effective relief unless they happen to warn their victims in advance. . . .
>
> When a significant chilling effect on free speech is created by a bad faith prosecution, the prosecution will thus as a matter of law cause irreparable injury regardless of its outcome, and

the federal courts cannot abstain from issuing an injunction.

Therefore, Lewellen's request for a preliminary injunction enjoining defendants from conducting a trial of his criminal action currently pending in the Circuit Court of Lee County, Arkansas, should be granted.

IT IS THEREFORE, ORDERED:

That Gene Raff, Esq., David Cahoon, Esq. and Circuit Judge Henry Wilkinson, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, are hereby enjoined from proceeding with the trial of plaintiff Roy C. Lewellen, Jr. in criminal case No. 85-50, currently pending in the Lee County Circuit Court of the First Judicial District of Arkansas pending adjudication of this action on the merits.

IT IS FURTHER ORDERED that plaintiff Roy C. Lewellen, Jr. post with the Clerk of the Court a bond in the sum of $1,000.00 for payment of such costs and damages as may be suffered or incurred by defendants if it be determined that the relief afforded herein is wrongful.

IT IS SO ORDERED this 8th day of December, 1986.

GEORGE HOWARD, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1069

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and in his official capacity as Prosecuting Attorney for the First Judicial District of Arkansas; David Cahoon, individually and in his official capacity as Deputy Prosecuting Attorney for Lee County, Arkansas; Henry Wilkinson, individually and in his official capacity as Circuit Court Judge for the First Judicial District of Arkansas,
Appellants.

Lafayette Patterson; Jeanne Kennedy; Doug Williams; Lee County, Arkansas; Robert May, Jr., individually and in his

official capacity as Sheriff
of Lee County.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

No. 87-1100

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and in
his official capacity as
Prosecuting Attorney for the
First Judicial District of
Arkansas; David Cahoon,
individually and in his
official capacity as Deputy
Prosecuting Attorney for
Lee County, Arkansas;
Lafayette Patterson; Jeanne
Kennedy;

Doug Williams,

Appellant.

Lee County, Arkansas;
Robert May, Jr., individually
and in his official capacity
as Sheriff of Lee County;
Henry Wilkinson, individually
and in his official capacity
as Circuit Court Judge for the
First Judicial District of
Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

No. 87-1101

Roy C. Lewellen, Jr.,
Appellee,

v.

Gene Raff, individually and
in his official capacity as
Prosecuting Attorney for the

Eastern Judicial District of
Arkansas; David Cahoon,
individually and in his
official capacity as Deputy
Prosecuting Attorney for
Lee County, Arkansas;
Lafayette Patterson; Jeanne
Kennedy; Doug Williams;
Lee County, Arkansas;

Robert May, Jr., individually
and in his official capacity
as Sheriff of Lee County,

Appellant.

Henry Wilkinson, individually
and in his official capacity
as Circuit Judge for the
First Judicial District of
Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

No. 87-1103

Roy C. Lewellen, Jr.,

Appellant,

v.

Gene Raff, individually and in his official capacity as Prosecuting Attorney for the First Judicial District of Arkansas; David Cahoon, individually and in his capacity as Deputy Prosecuting Attorney for Lee County, Arkansas,

Appellees.

Lafayette Patterson; Jeanne Kennedy; Doug Williams; Lee County, Arkansas; Robert May, Jr., individually and in his official capacity as Sheriff of Lee County; Henry Wilkinson, individually and in his official capacity as Circuit Court Judge for the First Judicial District of Arkansas.

Lafayette Patterson

v.

Robert Banks; Margie Banks;
Reverend Almore Banks.

On Petition for Rehearing

Filed: July 14, 1988

Before LAY, Chief Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

This court affirmed the district court's grant of a preliminary injunction enjoining state officers (the state) from proceeding with a criminal trial of Roy Lewellen. *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988). The state now petitions for rehearing, arguing that the court erred in: (1) not considering whether the state had a reasonable expectation of obtaining a conviction of Lewellen; and (2) holding that the district court's finding of retaliatory prosecution was not clearly erroneous. We reject the latter contention for the reasons discussed in our earlier opinion. The state's first contention, however, merits discussion.

In upholding the district court's decision not to abstain from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), this court refrained from discussing whether the prosecutors had a reasonable expectation of obtaining a conviction of Lewellen. *Lewellen*, 843 F.2d at 1112. We relied in part on *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981), which stated that a finding of retaliatory prosecution such as the one made by the district court here "will justify an injunction regardless of whether valid convictions conceivably could be obtained." *Id.* at 945.

The state argues that our holding is inconsistent with existing case law and misconstrues the reasoning of the Fifth Circuit in *Fitzgerald*, *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), and *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982). After careful reconsideration of the state's arguments and the relevant cases, we are convinced that this court's opinion is appropriate and consistent with applicable precedent.

The state contends that this court's reliance on *Fitzgerald* is misplaced; the gist of the state's argument is that the Fifth Circuit *sub silentio* overruled *Fitzgerald* in *Smith v. Hightower*.[1] We do not believe that *Hightower*

was intended to have this effect and, moreover, are satisfied that *Wilson*, *Fitzgerald*, and *Hightower* are entirely consistent with this court's opinion.

The specific holding of *Hightower* was that it is erroneous for a district court to refuse to consider evidence as to whether the prosecutors entertained a reasonable expectation of obtaining a conviction. *Hightower*, 693 F.2d at 369. The district court in *Hightower* completely "disregarded" evidence of the possibly criminal wrongdoing of the petitioner, reasoning that the only relevant evidence was the prosecutor's motives in bringing the charges. *Id.* at 369 n.24. In contrast, the district court in the present case reviewed the evidence of Lewellen's allegedly criminal activities at length and specifically concluded that there was a substantial likelihood that Lewellen would establish that the prosecutor "had no reasonable expectation of getting a conviction of Lewellen." *Lewellen v. Raff*, 649 F. Supp. 1229, 1233, (E.D. Ark. 1986). Thus, the *Hightower* court's direction that "the strength of the evidence and seriousness of the charges should be considered in determining if retaliation or bad faith exists," 693 F.2d at 369, was fully satisfied by the district court here.

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[1] To the extent the state argues that the court's reliance on Fitzgerald is misplaced because of the Fifth Circuit's statements in Wilson v. Thompson, the state overlooks that Fitzgerald was decided after Wilson.

The most significant clarification *Hightower* contributed to the Fifth Circuit's standards governing the bad faith exception to the *Younger* doctrine was its distinction between the quantum of proof necessary to obtain a preliminary injunction as opposed to a permanent injunction. It is this distinction that harmonizes *Wilson*, *Fitzgerald*, *Hightower*, and this court's opinion.

Under the Fifth Circuit's analysis, which we have followed, to obtain a preliminary injunction in this context the plaintiff need show only that the prosecution was motivated "in part" by a purpose to retaliate against constitutionally protected conduct. To obtain a permanent injunction, however, the plaintiff must show that **"but for"** the desire to retaliate the charges would not have been brought. *See Hightower*, 693 F.2d at 367 & n.19. Then, "*Wilson* makes it clear that the prospects of conviction and the significance of the alleged criminal activity is [sic] relevant to the determination whether the prosecution **would have been brought absent the retaliatory motive.**" *Id.* at 369 n.25 (emphasis added).

In ruling on the petition, the district court concluded that retaliatory motives were responsible for the prosecution of Lewellen. This finding is sufficient to sustain the issuance of a preliminary injunction. At this state, however, Lewellen did not have to prove the "but for" nature of the retaliatory motives. Thus, this court's review of the findings supporting the conclusion that the

prosecution was retaliatory is sufficient, because this court need not decide at this stage whether the prosecution would have been brought "but for" the retaliatory motives.

Assuming that the district court conducts a further evidentiary hearing or simply relies on the existing record, we emphasize that the grant of a permanent injunction, as we have discussed, involves not only different findings, but requires a more exacting appellate review. *See, e.g., Hiland Potato Chip Co. v. Culbro Corp.*, 671 F.2d 1190, 1192 (8th Cir. 1982) ("There is a marked difference between the trial judge's discretionary ruling weighing the factors relating to the issuance of a temporary injunction and the findings of fact and legal conclusions comprising a final judgment.")[2] We point out to the district court that mere discussion of the plaintiff's allegations does not constitute findings of fact;

---

[2] See also International Union, UAW v. Mack Trucks, Inc., 820 F.2d 91, 94-95 (3d Cir. 1987) ("We more closely review decisions on requests for permanent rather than for preliminary relief * * * since permanent injunction cases present more fully developed records."; Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982) ("Our review of the district court's findings, pursuant to its action on a motion for preliminary judgment is, of course, restricted to the limited record available to the district court when it granted or denied the motion. The district court's findings supporting its order granting or denying a permanent injunction may differ after presentation of all the evidence and so may our determination as to whether its subsequent findings are clearly erroneous."); Henry v. First Nat'l Bank, 595 F.2d 291, 302 (5th Cir. 1979) ("The standard for appellate review of a preliminary injunction is simply whether the district court abused its discretion in issuing the injunction; the reviewing court does not engage in the same plenary review that would be indicated on appeal of permanent relief."), cert. denied, 444 U.S. 1074 (1980).

more complete and definitive findings and legal conclusions are needed for this court to provide proper review of a permanent injunction.

Review of a grant of a preliminary injunction rests on an abuse of discretion standard. We have found no abuse here. The panel therefore adheres to its original opinion and denies the petition for rehearing directed to the panel. The state may renew its suggestion for rehearing en banc and may amend its petition to respond to this opinion..

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1069/1100/1101/1103EA

Roy C. Lewellen, Jr.,
Appellee,
vs.

Gene Raff, etc., et al,
Appellants.

Appeals from the United States
District Court for the
Eastern District of Arkansas.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 28, 1988

Order entered at the Direction of the Court:

ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals, Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

No. A-283

Gene Raff, etc., et al.,

Petitioners

v.

Roy C. Lewellen, Jr., etc., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 11 November, 1988.

s/HARRY A. BLACKMUN
Associate Justice of the
Supreme Court of the
United States

Dated this 12th day of October, 1988.

No. 88-776

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ARKANSAS STATE PROSECUTOR GENE RAFF, DEPUTY PROSECUTOR DAVID CAHOON, AND ARKANSAS LEE COUNTY CIRCUIT JUDGE HENRY WILKINSON, JR., IN THEIR OFFICIAL CAPACITIES ONLY,

Petitioners,

vs.

ROY C. LEWELLEN, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 88-776

In The

Supreme Court of the United States

October Term, 1988

ARKANSAS STATE PROSECUTOR GENE RAFF, DEPUTY PROSECUTOR DAVID CAHOON, AND ARKANSAS LEE COUNTY CIRCUIT JUDGE HENRY WILKINSON, JR., IN THEIR OFFICIAL CAPACITIES ONLY,

Petitioners,

vs.

ROY C. LEWELLEN, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Roy C. Lewellen, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Sometime in May, 1984, Respondent Roy C. Lewellen, a black attorney, was retained to defend Reverend Almore Banks against a charge of raping the eleven year old daughter of Lafayetta Patterson. (T. 397-398). On September 3, 1985, jury selection began in the Banks trial. During the prior week, however, there had been intensive plea negotiations between Lewellen and petitioners, Raff and Cahoon. The plea offers ranged from "no jail time" to "jail time washing cars" to the last offer of "ten years suspended sentence." (T. 441). The day trial began, Raff and Cahoon informed Mrs. Patterson that the State's case had certain weaknesses – lack of medical proof and a defective information – that might be difficult to overcome. (T. 627-633).

Simultaneous with the plea negotiations, and for some time before, Mrs. Patterson had been telling Cahoon that her husband, Joe Patterson, and his relatives were pressuring her to terminate the prosecution by "dropping the charges." Mr. Patterson was the stepfather of the victim and the brother of Margie Banks, the wife of Almore Banks. (T. 9, 34-35).

Lewellen first learned of Mrs. Patterson's reputed desire to "drop the charges" on September 4, 1985, when he was informed by Margie Banks, and was told to go to the office of Olly Neal, the only other black attorney in Marianna, Arkansas. Neal was a black attorney retained by Mrs. Patterson to resist Lewellen's motion for a psychological examination of her child. (T. 405-410; 444). At Neal's office, Lewellen told Neal that he understood Mrs. Patterson wanted to drop the charges. Neal told Lewellen

that he knew nothing about it, but would go to the prosecutors if Mrs. Patterson informed him she did not want to proceed. (T. 444-445; 616-619). After talking to Mrs. Patterson alone, Neal told Lewellen and Mr. Patterson that Mrs. Patterson did not want to drop the charges. (T. 445, 659). Lewellen said nothing and went back to court. (T. 446).

Later, during the noon recess of the Banks trial, Lewellen received a call from Mr. Patterson in his office and was told that Mrs. Patterson had talked to her daughter and that the daughter did not want to pursue the case and "that [Lafayetta Patterson] wanted to see Al and Margie." (T. 447). Mrs. Patterson then told Lewellen that her daughter wanted to drop the charges and asked to see Margie and Almore Banks "face to face". Prior to speaking with Mrs. Patterson, Lewellen advised her that anything she said to him could be used in court. (T. 206; 447-448).

Lewellen transported Almore Banks and his wife to the Patterson home. He left them there with Robert Banks (Almore's brother), Mr. Patterson, and Mrs. Patterson. (T. 449-450). The meeting concluded with Almore Banks agreeing to leave town and Mrs. Patterson agreeing to drop the charges. Lewellen returned to pick up Almore Banks and declined to listen to an account of the meeting. 843 F.2d at 1106 (T. 207-208; 452).

Mrs. Patterson called Neal after the meeting and told him that she wanted to drop the charges. Neal told her he would call her back. Later, Mrs. Patterson told Neal that "Almore was looking in her mouth" when she told him that she wanted to drop the charges. (T. 75, 621, 728-730).

She did not tell Neal that she had lied to her husband and relatives about her intentions, nor that she had been in contact with Cahoon and Sheriff May regarding alleged harassment and pressure from her family. (T. 731-732; 670-671; 76-77). Neal, however, had previously told Mrs. Patterson that if her husband pressured her about dropping the charges he would not intervene. Also, he had informed her that he would take action if Almore Banks confronted her. (T. 611-613).

The next day, Neal called Cahoon and related the contact Mrs. Patterson had with Almore Banks and suggested a meeting with her. (T. 680). Unknown to Neal, Mrs. Patterson had already been in contact with Cahoon and Sheriff May at the jail. (T. 731-732, 37-39). May had called the state police and requested electronic surveillance assistance. State Trooper Williams arrived with the equipment before Mrs. Patterson arrived. (T. 334, 762, 879). Upon arrival, Mrs. Patterson told Williams that Almore Banks had offered her a sum of money, his wife's home, and "that Mr. Banks would leave Marianna forever . . . ," if she dropped the charges. (T. 888). Mrs. Patterson was served with a witness subpoena and asked to wear a body microphone. (T. 1078, 329). Neal was then called. (T. 41). Neal arrived and informed Cahoon, May, and Williams that he thought it was inappropriate for Banks to have confronted Mrs. Patterson at her house. (T. 692). Mrs. Patterson was fitted with the microphone. She was told to be sure to get Margie and Almore Banks to repeat their offers. (T. 82, 694-695). It was believed by Cahoon, May, and Williams that if she contacted her husband, contact would be made with Almore Banks and Lewellen. (T. 385, 895). The conversations would be recorded by

May, Williams, and Cahoon, who would follow Mrs. Patterson in the sheriff's car. (T. 342).

At her house, Mrs. Patterson told Mr. Patterson she "was tired" and would "drop the charges" if Almore Banks would leave town and her legal fee of $500 was reimbursed. She also demanded that a "paper" be drafted by a lawyer to reflect his agreement to leave town. (T. 1268). Inexplicably, this conversation was not recorded.

Mr. Patterson, after learning of Mrs. Patterson's new demands, called Robert Banks and related the demands to him. (T. 1281). This conversation was partially recorded and appears on the tape out of sequence. (T. 1271, 1281-1282). Mr. Patterson then called Almore Bank's home and talked to his sister, Margie, because Almore was at his church. He related to Margie what Mrs. Patterson wanted. This conversation is not on tape. Mr. Patterson then talked to Almore Banks, and related the same information to him. He then talked to Margie Banks again. The tape made at defendant Patterson's home and alleged to be the original has conversations out of sequence, conversations missing, and incomplete conversations. (T. 1212, 1346, 1271-1277; Pet. App. A47).

Almore Banks indicated he wanted Lewellen to draft the "paper" and would not deal with Neal when she suggested the latter (although she knew he was at the sheriff's office). (T. 1280). Mrs. Patterson left home and returned to the jail. (T. 102). She spoke to Cahoon who instructed her to proceed to Lewellen's office. (T. 1003; 793).

Lewellen was in his office when he received a call from Almore Banks. Almore Banks informed Lewellen

that Mrs. Patterson wanted to drop the charges and that he was coming to his office. (T. 454-455). Shortly thereafter, Almore Banks reached Lewellen's office and explained that Mrs. Patterson wanted him to draft a "paper" setting forth an agreement that he would leave town. Lewellen explained to his client that he could not draft such an agreement nor would he let him agree to sign such a document (T. 455)

Mrs. Patterson arrived at Lewellen's office. Lewellen took her into his inner office and again cautioned her about talking to him. (T. 459).

Lewellen, believing Mrs. Patterson was sincere, spoke frankly with her, expressing his fear of retaliation by Gene Raff because of his aggressive representation of Almore Banks, and his fear that Raff would tape his conversations using an informer. *Lewellen v. Raff*, 843 F.2d 1103, 1107 N.4 (T. 460-462). After Mr. Patterson, Almore Banks, and Margie Banks arrived and joined the conversation, there was another discussion of the offer Mrs. Patterson had made and the agreement by Almore Banks to leave town. Robert Banks had already agreed to reimburse the $500 legal fee. There was no other discussion of money, and no discussion about signing over the house that Almore and Margie lived in (T. 464-465; Id.).

Williams took the tapes to May's home and played the tapes for Raff, Cahoon, and May. The group then went to Cahoon's law firm and "rehashed" the evidence into the "wee" hours of the morning. (T. 936-938). The tape was also transcribed. (T. 841). Raff told Williams that he would feel better "if they had a clarification of the expression of 'drop the charges.'" (T. 939). He ordered

another taping of Lewellen. 843 F.2d 1107 - 1108 (T. 939, 352).

The following day, Williams met Mrs. Patterson and took a written statement from her. Lewellen, in court, received a message marked 'urgent' from the sheriff's secretary, containing Mrs. Patterson's telephone number. (T. 420-422; 134). Although he did not recognize the telephone number, Lewellen called and spoke to Mrs. Pattterson. She indicated to Lewellen that Neal was not assisting her and that she was receiving no cooperation from Raff and Cahoon in dropping the charges. Lewellen advised her to get another attorney and recommended Attorney L. T. Simes. Lewellen believed that Mrs. Patterson sincerely wanted to terminate the prosecution and was receiving no cooperation. In the course of the conversation, Lewellen attempted to explain her rights as the mother of the child victim. (T. 472-475).

On September 9, 1985, the Bank's trial resumed with jury selection. Immediately, however, Raff and Cahoon informed Judge Yates of the bribery investigation. After a hearing wherein Williams and Mrs. Patterson testified, a mistrial was declared. Lewellen was neither permitted to cross-examine nor to call witnesses. 843 F.2d 1108. And the court refused his request for counsel.[1] On the same day, May and Williams interviewed L. T. Simes and requested him to sign a statement that Lewellen had "requested Mr. Simes to ask her [Mrs. Patterson] to sign a document which would state that he [Lewellen] had never had contact with Mrs. Patterson." Simes declined

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[1] See Addendum to Respondent's Brief on Appeal, pp. 61-62, 67-70, 71-73, 105. (Transcript of Special Hearing).

to sign the statement. (T. 372). Instead, he recorded his recollection that Lewellen asked him to draft a document reflecting that Lewellen had not initiated contact with Mrs. Patterson. (Addendum to Respondent's Brief on Appeal, pp. 136-137, 169-170).

Several days after the taping, Williams and May interviewed Mr. Patterson. (T. 385). During the interview, Mr. Patterson felt threatened with a charge of bribery and was told "to look out for yourself." Nonetheless, he told May and Williams that he knew of no bribery, that the $500 was requested by Mrs. Patterson, and that Lewellen never offered any money to her. (T. 264; 377). On September 24, 1985, Williams and May recorded an interview with Neal who informed them that Lewellen never attempted to talk to him about the case, nor ever mentioned "passing any money." He did not implicate Lewellen in any wrongdoing or improper conduct towards his client, Mrs. Patterson. (Addendum, 171-178).

On September 27, 1985, May executed an affidavit in support of an information charging Lewellen and Almore Banks with witness bribery and conspiracy to commit witness bribery. 843 F.2d 1108.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct and does not conflict with decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners suggest that this Court should grant review of the decision below because the Eighth Circuit Court of Appeals crafted a new rule with regard to applying the *Younger* abstention doctrine. According to petitioners, the new rule permits a criminal defendant to preliminarily enjoin an ongoing state prosecution by simply establishing that the prosecution was "motivated 'in part' by an allegedly improper retaliatory purpose." *Petition* at 7. Petitioners suggest that such a standard does not require consideration of whether there is a reasonable expectation of obtaining a valid conviction and, thus, the courts below did not consider the strength of the state's case against Lewellen.

Petitioners assert that the "new rule" is a truncated version of the test employed by the Fifth Circuit in a suit to enjoin a criminal prosecution brought in retaliation for or to deter the exercise of constitutionally protected rights. Petitioners do not claim, however, that the Fifth Circuit test is inconsistent with or in conflict with the *Younger* abstention doctrine, nor with other circuit decisions. Rather, petitioners suggest that the Fifth Circuit test is erroneously applied by the Court of Appeals because it did not consider the strength of the evidence and the seriousness of the charges. Moreover, petitioners assert that the Fifth Circuit test requires a plaintiff to establish that retaliation was a *major motivating factor* in the state prosecution rather than being motivated *in part* by retaliation.

2. In *Younger v. Harris*, 401 U.S. 37, 53, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), this Court firmly established that federal injunctive relief against state criminal proceedings is available only where a plaintiff demonstrates great

and immediate irreparable injury in the form of a bad faith prosecution, harassment, or other extraordinary circumstances. In a companion case, *Perez v. Ledesma*, 401 U.S. 82, 85, 27 L.Ed.2d 701, 91 S.Ct. 679 (1971), the Court explained that a bad faith prosecution was one instituted "without hope of obtaining a valid conviction . . . ." *Kugler v. Helfant*, 421 U.S. 117, 124, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975). The Eighth Circuit Court of Appeals, as well as other circuits, recognizes that a significant component of a bad faith prosecution is the "lack of a reasonable expectation that valid convictions will result." *Central Ave. News, Inc. v. City of Minot, N.D.*, 651 F.2d 565, 579 (8th Cir. 1981); *Munson v. Janklow*, 563 F.2d 933, 935 (8th Cir. 1977); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1022 N.14 (3rd Cir. 1981); *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975).

The Fifth Circuit Court of Appeals, however, has taken the lead in developing a test applicable to a bad faith prosecution which is brought under a valid statute for constitutionally impermissible reasons. As to federal actions to enjoin a state criminal prosecution brought in retaliation for or to deter the exercise of constitutionally protected rights, the Fifth Circuit held:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a

> preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

This test was set forth in *Wilson v. Thompson*, 593 F.2d 1375, 1383 (8th Cir. 1979). Therein, the Fifth Circuit reasoned that, in an action to enjoin a bad faith prosecution, as opposed to a good faith prosecution brought under an allegedly invalid statute, proving a bad faith prosecution is equivalent to proving irreparable injury. *Id.* at 1382; *Shaw v. Garrison*, 467 F.2d 113, 120, (5th Cir.) *Cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972); *accord: Collins v. County of Kendall, Ill.*, 807 F.2d 95 (7th Cir. 1986). Thus, contrary to petitioner's suggestion, it is irrelevant whether or not Lewellen can raise his bad faith prosecution claim as a defense in the state criminal proceedings. *Wilson v. Thompson, supra*, at 1385, N.17; *Council for Periodical Distributors Ass'n v. Evans*, 642 F.Supp. 552, 565-566 (M.D. Ala. 1986). Moreover, as the Court of Appeals indicated, the Fifth Circuit did not graft onto the traditional prerequisites for a preliminary injunction additional components derived from the Court's decision in *Younger*. Rather, the Fifth Circuit reconciled the traditional test for injunctive relief by incorporating the narrow exceptions to the abstention doctrine into the traditional requirements that a plaintiff demonstrate irreparable injury and likelihood of success. 843 F.2d 1113; *Wilson v. Thompson*, 1384-1385; *Smith v. Hightower*, 693 F.2d 359, 369 N.25, 370, N.27 (5th Cir. 1982); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982). This is entirely consistent with *Younger*, but contrary to the suggestion of the petitioners that respondent had to

satisfy the traditional preliminary injunction standard, as well as jurisdictional prerequisites under *Younger*.

Thus, the test constructed by the Fifth Circuit requires consideration of whether there is a reasonable expectation of a valid conviction, i.e., the State's evidence, in regard to proving irreparable injury and the likelihood of success on the merits. The Fifth Circuit test, however, does not require a showing that a valid conviction could not conceivably be obtained. *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir. 1981), *Cert. Denied*, 452 U.S. 916 (1982). In crafting the test and allocating the burden of proof, the Fifth Circuit looked to this Court's decisions in cases involving other forms of retaliation against plaintiffs for the exercise of constitutionally protected conduct, and to those cases establishing tests for determining whether a state decision was motivated by a discriminatory purpose. *Wilson v. Thompson* pp. 1386-1387. *See: Mt. Healthy City Board of Education v. Doyle* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Village of Arlington Hgts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Clearly, the Fifth Circuit test applied by the Court of Appeals and District Court below is grounded on sound precedent and employs principles that are well settled in analogous cases.

Petitioners suggest that the Fifth Circuit test was not followed faithfully by the Eighth Circuit in this case, and, as a consequence, applied a test which is less stringent and permits the *Younger* doctrine of abstention to be circumvented. Petitioners misapprehend the analysis of the Fifth Circuit which undergirds the *Wilson* test and "confuses the allocation of the burden of proof with the sufficiency of the evidence to carry the burden," *Smith v.*

Hightower, 693 F.2d at 367; CF: *Petition* at 7. In *Smith v. Hightower,* the Fifth Circuit made it clear that the "at least in part" language did not lighten the heavy burden on the plaintiff to demonstrate retaliation. Rather, the use of such language in *Wilson,* was intended to establish the quantum of evidence "necessary to establish the likelihood of success on the merits" on a request for a preliminary injunction, as opposed to establishing "actual success," which is required for a permanent injunction. *Id.* at 367, N.19. Even under that language a plaintiff must still "prove retaliation was a major motivating factor and played a prominent role in the decision to prosecute." *Id. See also: Gates v. City of Dallas,* 729 F.2d 343, 346 (5th Cir. 1984). In *Smith v. Hightower,* the Fifth Circuit reversed the grant of an injunction because the district court failed altogether to consider "evidence of crimes and wrongdoing" by the plaintiff. *Id.* at 370. In the case *sub judice,* the Court of Appeals was correct in sustaining the preliminary injunction, for it is clear on the record that the District Court below considered the evidence that allegedly incriminated Lewellen.

3. Indeed, petitioners do not assert that the District Court failed to apply the three-prong test of *Wilson* and *Smith v. Hightower.* It is very apparent that the District Court made explicit and specific findings that: a) the conduct retaliated against or sought to be impeded was constitutionally protected; b) that the criminal proceeding initiated by petitioners was brought in bad faith to retaliate against Lewellen for exercising federally protected rights; and c) that the criminal charges would not have been filed absent the desire to retaliate against Lewellen. (Pet. App. A45-A46).

The District Court specifically concluded that Lewellen had demonstrated that petitioners had no expectation of a valid conviction and, therefore, there was a "substantial likelihood that Lewellen will prevail on the merits." *Id.* In making that determination, the District Court discussed the probative value of the sole evidence that petitioners offered in support of the charges of witness bribery – the surreptitious taping of Lewellen – and found it wanting. (Pet. App. A46-A47). This conclusion rests on subsidiary factual findings, i.e. the condition of the tapes, an admission by Petitioner Raff that the initial tapes were insufficient as evidence of bribery under the state statute, and testimony of several witnesses, including petitioner's expert, that it is a common practice in Arkansas for lawyers "to serve as intermediaries in seeking to have criminal charges 'dropped' or nol prosed.' " (Pet. App. A47-A48).

Indeed, the District Court could have made other findings that supported its conclusion that the charges were instituted without an expectation of a valid conviction. It is clear from the face of the Arkansas witness bribery statute that it does not include as an offense efforts to have charges "dropped" or prosecutions terminated. 843 F.2d 1107 N.5. Petitioners are unable to cite (and the District Court did not hear) any evidence to support the claim that Lewellen was seeking to influence the testimony of Mrs. Patterson or to induce her to avoid legal process or to defy a subpoena. Petitioners' sole evidence proffered in this regard is the excerpt from the last taping. *Petition* at 22. Petitioners, however, fail to point out that, in that conversation, Mrs. Patterson lied to Lewellen about her desire to terminate the prosecution as

well as the lack of cooperation by her attorneys and petitioners, and that Lewellen referred her to another attorney for assistance. (T. 473-474). Moreover, there was substantial evidence that Lewellen advised her continually to work through her attorney, Olly Neal. (T. 444-445,616, 452-453, 460-465). Petitioners' assertion that "Lewellen admitted he negotiated a secret agreement whereby Mrs. Patterson would be paid $500 in exchange for her agreement to 'drop the charges' " is a disingenuous mischaracterization of the record. *Petition* at 21. It is clear from the tape itself as to why Lewellen expressed caution with regard to his involvement in the meeting in his office. He had a well-grounded fear based on racial history, political corruption in Eastern Arkansas, and his experience in the Banks trial that Raff would accuse him of intimidating, bribing, or tampering with a witness. 843 F.2d 1107-1108, N.4. From all the circumstances and evidence, it is clear that Lewellen was only attempting to assist Mrs. Patterson in her reputed desire to terminate the charges. Lewellen's conduct was clearly outside the scope of the Arkansas witness bribery statute.

Contrary to petitioner's claim, the District Court did find that the prosecution of Lewellen was motivated by his race and was consistent with the disparate treatment black attorneys received in the Lee County court system. (Pet. App. A44-A45). On that issue, the District Court cited Lewellen's treatment during the Banks trial, and the suggestion by Sheriff May that Lewellen apologize to Raff to minimize the consequences of the criminal charges. *Id.* The District Court also heard testimony during the first hearing on a temporary restraining order that Petitioner Cahoon frequently used derogatory racial slurs

towards and in the presence of black attorneys, a fact confirmed by a law partner of Cahoon. (Addendum to Brief on Appeal, 193, 221-223, 235-237, 38). The record before the courts below also included deposition testimony of four black attorneys regarding discriminatory treatment by Raff and judges in appointments, professional and judicial discipline, plea bargaining, and jury selection, as well as Raff's extraordinary influence over the judicial system. (*Id.*, 132, 134, 140-141, 146, 636, 644, 203, 205, 240-247).

Similarly, the testimony of Lewellen and Sam Blount provided direct evidence in support of the finding that the prosecution was also motivated by Lewellen's vigorous defense of his client. Together with the unfair treatment of Lewellen during the Banks trial, the weakness of the State's case against Banks, and the circumstances surrounding the alleged investigation of Lewellen, such evidence was more than sufficient. Indeed, in view of petitioner's failure to testify or to otherwise present countervailing evidence, the District court was compelled to so find.

Finally, the District court found the scheduling of Lewellen's trial in the state proceeding during his candidacy for state office significant and supportive of Lewellen's allegation that the prosecution was undertaken, in part, to retaliate against him for his candidacy. (Pet. App. at A45, N.5).[2] the District Court, however, also opined that, at a trial on the merits, Lewellen would be able to further establish the nexus between his prosecution and his candidacy for state office, including the

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[2] See also: A40-A41 and notes thereunder.

relationship between Raff and Lewellen's political opponent. (*Id.*). It had before it evidence relevant to campaign harassment by state and local officials and to campaign propaganda by his political opponent regarding the pending prosecution. (Addendum to Brief on Appeal, pp. 215-219).

4. Petitioners are correct that the Court of Appeals did not discuss the issue of whether or not there was a reasonable expectation of obtaining a valid conviction of Lewellen in the first opinion. 843 F.2d 1112. It is clear, however, that the Court of Appeals reviewed that aspect of the District Court's decision in response to petitioners' first petition for rehearing. In its second opinion, the Court of Appeals specifically found that the District Court "reviewed the evidence of Lewellen's allegedly criminal activities at length and specifically concluded that there was a substantial likelihood that Lewellen would establish that the prosecutor 'had no reasonable expectation of getting a conviction of Lewellen'." *Lewellen v. Raff*, 851 F.2d 1108, 1110 (8th Cir. 1988).

The Court of Appeals also explained its failure to address that issue in its first opinion and its finding that the prosecution was "motivated in part by a purpose to retaliate against constitutionally protected conduct." It was held that, in the context of a preliminary injunction, Lewellen was not required to "show that 'but for' the desire to retaliate the charges would not have been brought." *Id.* The analysis of the Court of Appeals is consistent with *Wilson* and *Hightower* in every respect and reflects the difference between the quantum of proof necessary to obtain a preliminary injunction as opposed to a permanent injunction.

Indeed, if Lewellen had been required to satisfy the "but for" test within the limited confines of a hearing on a preliminary injunction, it would have been clear error. It is firmly established that a party is entitled to notice that permanent rather than temporary relief is being determined. *Capital City Gas Company v. Phillips Petroleum Company,* 373 F.2d 128 (2nd Cir. 1969). The District Court repeatedly informed the parties during the hearing on the preliminary injunction that it was not a trial on the merits. (Pet. App. at A45, N.5; also, T. 5, 8).

5. Finally, petitioners suggest that, for policy reasons, this Court should review the case *sub judice.* Petitioners argue that the impact of a preliminary injunction is the same as a permanent injunction. Essentially, it is asserted that *any* federal interference with a state criminal proceeding cripples the ability of the state to prosecute a plaintiff seeking relief from a bad faith prosecution under exceptions to the *Younger* doctrine. A preliminary injunction, petitioners suggest, depreciates the evidence, assures the abandonment of the prosecution, permits discovery not allowed under the state rules of criminal procedure, and diminishes the prospect of conviction. *Petition* 12-13.

The value of such claims as these are almost rhetorical. Clearly, every judicial proceeding of record preserves rather than destroys evidence by its very nature. More importantly, as the Court of Appeals noted, the *Younger* abstention doctrine "is based on comity and federalism," and a state has no legitimate interest in pursuing a bad faith prosecution. 843 F.2d at 1110; *Lewellen v. Raff,* 649 F.Supp. 1229, 1234 (E.D. Ark., 1986); *Wilson v. Thompson,* at 1383. It is clear that, in this case, the sole evidence

offered by the state as allegedly incriminating Lewellen on the charges of bribery comprises one statement by Lewellen, taken out of context, which is preserved on tape. For whatever it is worth, that evidence is forever preserved for all practical purposes.

The policy argument advanced by petitioners would lead to the elimination of preliminary relief and appellate review under 28 U.S.C. 1292. Petitioners' rationale would require a full trial on the merits on every well plead claim of bad faith prosecution under the *Younger* exceptions, if such exceptions are to survive. Otherwise, district courts would be constrained to dismiss every claim, effectively destroying the narrow, but necessary exceptions to the *Younger* doctrine of abstention.

Obviously, the petitioners' cure would kill the patient.

CONCLUSION

The Courts below had ample evidence on which to base a finding that the prosecution of Respondent Roy C. Lewellen was instituted in bad faith without a reasonable expectation of a conviction. The District Court conscientiously applied the Fifth Circuit test announced in *Wilson* and *Smith v. Hightower*. Upon review, the Court of Appeals correctly held that the District Court's findings were not clearly erroneous and supported the issuance of a preliminary injunction. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Moreover, on the petition for rehearing, the Court of Appeals specifically held that the District Court had considered whether the prosecution was instituted with a reasonable expectation of a conviction. Clearly, the Court

of Appeals did not modify the *Wilson* test, nor lessen the burden on Lewellen to prove a bad faith prosecution. Indeed, petitioners failed to carry their burden of demonstrating that they would have reached the same decision to prosecute had the retaliatory motives not been considered. *Wilson v. Thompson* at 1387.

The Court of Appeals' decision does not conflict with decisions of this Court or other circuit courts. And petitioners have not demonstrated a need for this Court to extinguish the distinction between preliminary and permanent injunctions in suits brought under the limited exceptions to the *Younger* abstention doctrine.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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